

1 would be for “[t]he sale, transfer or exchange of any publicly owned real property, but only if the
2 property is not subject to an authorized public use.” WAC 197-11-800(5)(b). Resp. at 6. This
3 claim that only a “sale” exemption could be relevant to the Resolution cannot be squared with
4 MNPC’s repeated assertions that the Resolution “is but a single action for environmental
5 purposes, i.e., the proposal to purchase land.” MNPC Sum. Jud. Resp. at 9-11. MNPC cannot
6 have it both ways.

7 If MNPC insists on having it both ways, MNPC must concede that the Resolution
8 involves both a sale and purchase. A purchase and a sale are necessarily part of a “series of
9 connected actions for which federal approval must be obtained,” and thus cannot be an “action.”
10 WAC 197-11-704(2)(b)(iii).

11 Even on its face, MNPC’s argument that the Resolution is a non-exempt “sale” fails.
12 MNPC gains nothing from noting that the “sale” exemption applies only if the property sold “is
13 not subject to an authorized public use.” WAC 197-11-800(5)(b). To the extent MNPC is
14 referring to a sale by the federal government, the City need not establish an exemption for the
15 federal government’s decision to sell—a decision not subject to SEPA. WAC 197-11-714(1)
16 (“agency”). Even if the City had to extend SEPA to cover the federal government, the Army is
17 not selling property subject to an authorized public use, but property the federal government has
18 determined to be surplus and subject to disposal. Regarding any subsequent sale of land by the
19 City, MNPC misses the point by noting that the Resolution proposes that the City retain

20
21 groundless, as demonstrated by the language of the case law cited by the City. See Appendix. MNPC’s attack on
22 Lassila v. City of Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978), is particularly nonsensical. Lassila was decided
23 before adoption of the SEPA rule, which now clearly controls. Contrary to MNPC’s suggestion, King County v.
Boundary Rev. Bd., 122 Wn.2d 648, 860 P.2d 1024 (1993), did not overrule Lassila and did not discuss a single
categorical exemption. The City already has distinguished King County. See City Sum. Jud. Resp. at 29-30.
Moreover, the Legislature immediately reversed King County by adopting a statutory categorical exemption for
annexations, which were the subject of that case. Laws of 1994, ch. 216, § 19 (enacting RCW 43.21C.222).

1 ownership of portions of the property for public uses like parks and streets. Cf. Resp. at 6.

2 Because the City envisions **not** selling “public use” land, WAC 197-11-800(5)(b) would exempt
3 future City land sales.

4 Because the Resolution, as described by MNPC, is categorically exempt, MNPC gains no
5 traction from language in the SEPA rules calling for a threshold determination to be made at the
6 “earliest possible” time. Resp. at 4 (quoting WAC 197-11-055(2)). MNPC overlooks the fact
7 that this language does not apply to actions that are categorically exempt. See, e.g., PUD No. 1
8 v. Pollution Control Hearings Bd., 137 Wn. App. 150, 163, 151 P.3d 1067 (2007).

9 **B. MNPC’s “series of actions” argument proves that SEPA does not apply.**

10 Against the categorical exemption argument, MNPC is now forced to execute an about-
11 face—one that leads MNPC back to the City’s original response to MNPC’s motion: that the
12 Resolution, at most, constituted a plan expressly defined as a non-action under SEPA. MNPC
13 now relies on WAC 197-11-305(1), arguing that the City’s purchase is “a segment of a proposal
14 that includes [a] series of actions, physically or functionally related to each other, some of which
15 are categorically exempt and some of which are not.” Resp. at 7. The basis for asserting that the
16 purchase is a “segment” is, of course, that the Resolution contemplates a series of related actions,
17 which MNPC now catalogues in detail. Id. at 7-8. But as the City originally argued, SEPA
18 **excludes** from the definition of “action” a plan, subject to federal approval, that “will govern the
19 development of a **series of connected actions** (WAC 197-11-060).” WAC 197-11-704(2)(b)(iii)
20 (emphasis added).² If MNPC now contends that the Resolution covers a series of physically or
21 functionally related actions, then MNPC must concede that this exclusion applies.

22 _____
23 ² The cross-referenced section (WAC 197-11-060) deals with “proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action” and “are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.”

1 Even if MNPC's reliance on WAC 197-11-305(1) did not lead to the conclusion that the
2 Resolution was not an "action" under SEPA, MNPC's argument would still fail because that
3 very subsection provides that "the agency...**may proceed with the exempt aspects** of the
4 proposals, prior to conducting environmental review, if the requirements of WAC 197-11-070
5 are met." WAC 197-11-305(1) (emphasis added). WAC 197-11-070(1), in turn, allows an
6 agency to take actions before it conducts SEPA review, if the action will not "[h]ave an adverse
7 environmental impact," and will not "[l]imit the choice of reasonable alternatives." A purchase,
8 standing alone, has no environmental impact, and MNPC has never suggested that the City's
9 alleged decision to purchase limited the choice of **reasonable** alternatives. What alternatives, if
10 any, the City might have for use of the land will depend on future federal decisions and
11 conditions, and the Resolution would not prevent the City from pursuing them. Moreover, a
12 "reasonable alternative" is one that "could feasibly attain or approximate a proposal's
13 objectives." WAC 197-11-786. The only alternative MNPC insists that the City study is
14 "developing the property as a part of Discovery Park." MNPC Mot. at 19. But MNPC cannot
15 show how that alternative could feasibly attain or approximate the public objectives for which
16 the Resolution was adopted, particularly the federal mandate to balance the needs of the
17 homeless among other needs. See BRAC Act § 2905(b); 32.CFR § 176.1. An all-park
18 alternative cannot strike that balance and would be unreasonable. Thus, even under WAC 197-
19 11-305(1), the City could still proceed with what MNPC insisted that the Resolution was: a
20 decision to purchase land.

21 **C. MNPC's various other arguments lack merit.**

22 MNPC incorrectly claims that the City is barred from bringing this motion. "[W]here an
23 issue does not depend on new facts and is closely related to an issue previously raised, it may be

1 raised in a motion for reconsideration.” Anderson v. Farmers Ins. Co., 83 Wn. App. 725, 734,
2 923 P.2d 713 (1996). The City’s motion is permissible because it offers briefing (without new
3 facts) on an argument first raised by a plaintiff in a reply brief. Decisions barring plaintiffs from
4 amending their complaints through motions for reconsideration are inapposite. Cf. Resp. at 2.

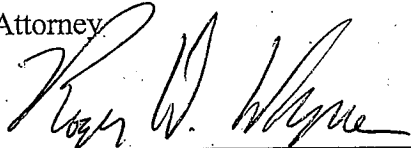
5 MNPC invokes an Administrative Procedures Act decision in which the court—limited to
6 the administrative record and having to consider whether a challenged regulation “could not
7 conceivably have been the product of a rational decision-maker”—noted federal administrative
8 case law barring post-hoc rationalizations by counsel. Resp. at 5 (citing Aviation West Corp. v.
9 Dept. of Labor & Indust., 138 Wn.2d 413, 436, 980 P.2d 701 (1999)). That decision is not
10 applicable here, in a case that is not subject to that standard of review or limited by law to some
11 decision-maker’s stated justification for a regulation.

12 Finally, MNPC claims that the Court did not use SEPA as a basis for its conclusion that
13 the City must “acknowledge” the Discovery Park Plan and “talk about why it does or does not
14 apply to what the City wants to do with the ARC property.” See Transcript at 16. Although the
15 Court’s rationale is not evident, the only conceivable basis for a procedural requirement to
16 discuss an action’s impact on a plan is SEPA. The Resolution, if a SEPA “action” at all, is
17 categorically exempt from SEPA review.

18 Respectfully submitted April 17, 2009.

19 THOMAS A. CARR
20 Seattle City Attorney

21 By:


22 Roger D. Wynne, WSBA # 23399

23 Assistant City Attorney for Respondent City of Seattle

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APPENDIX

Text of case law cited by the City for the proposition that “courts have long recognized and applied” a SEPA exemption for the purchase or acquisition of any right to real property.
See Mot. for Reconsideration at 5.

(Emphasis added.)

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 421, 128 P.3d 588 (2006)

However, it is not the role of the court to take a second look at the various environmental considerations at issue. As long as Sound Transit considered the environmental impacts, it is not for the court to substitute its judgment in the absence of some demonstration of fraud or arbitrary and capricious conduct. *See Brannan*, 85 Wn.2d at 74-77. **We note in passing that questions of public use and necessity are not subject to the State Environmental Policy Act, chapter 43.21C RCW. See generally Marino Prop. Co. v. Port of Seattle**, 88 Wn.2d 822, 830-31, 567 P.2d 1125 (1977).

Yakima County v. Evans, 135 Wn. App. 212, 220-21, 143 P.3d 891 (2006)

The Evanses assert that the SEPA checklist and finding of a Final Determination of Nonsignificance were inadequate and erroneous. Relying on *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978), the Evanses contend there is no evidence in the record demonstrating even a limited consideration of all aspects of the project. Specifically, they maintain that the environmental impact of the expanded plan, including the S-curves, was never considered by the County.

This court's review of this issue is limited. **This court does not review the environmental issues because questions of public use and necessity are not subject to SEPA. Miller**, 156 Wn.2d at 421. **Condemnation proceedings have been effectively removed from SEPA's reach by WAC 197-11-800(5)(a).** Consequently, as long as the County considered the environmental impacts here, this court will not substitute its judgment absent a demonstration of fraud or arbitrary conduct. *See Miller*, 156 Wn.2d at 421.

1 Petition of Port of Grays Harbor, 30 Wn. App. 855, 865, 638 P.2d 633 (1982) (decided
2 under a prior codification of the exemption³)

3 We agree with the Port's argument that **the bare act of condemnation is not**
4 **subject to the provisions of SEPA**, despite suggestions in *State v. Brannan*, 85 Wn.2d
5 64, 530 P.2d 322 (1975), that SEPA considerations might have been relevant to a public
6 use and necessity determination. Since the *Brannan* opinion was written, **condemnation**
7 **proceedings have been effectively removed from SEPA's ambit** by WAC 197-10-170.
8 This regulation provides for "categorical exemptions"-governmental activities which are
9 exempted from the threshold determination and EIS requirements of SEPA. **Included in**
10 **these exempted actions is the purchase or acquisition of any right to real property**
11 **by an agency.** WAC 197-10-170(9)(a). **Thus condemnation of real property, being**
12 **acquisition of rights to the condemned property, is exempt from the provisions of**
13 **SEPA.** *Marino Property Co. v. Port of Seattle*, 88 Wn.2d 822, 830-31, 567 P.2d 1125
14 (1977); *State v. Hutch*, [30 Wn. App. 28, 631 P.2d 1014 (1981)].

15 Lassila v. City of Wenatchee, 89 Wn.2d 804, 815, 576 P.2d 54 (1978) (decided without
16 reference to any codification of the exemption⁴)

17 Next, we turn to appellant's challenge of the City's *selection* of site No. 2, the
18 *acquisition* of real property at that site, and the subsequent "surplus" declaration and
19 *resale* of certain of the acquired property. We can conceive of no environmental
20 evaluation (beyond pure speculation) that would have been possible at the time the City
21 considered *selection* of site No. 2. Mere mental gymnastics of this kind do not require
22 environmental evaluation. This is particularly true where, as here, the trial court made an
23 unchallenged finding that the City had no definite plan to proceed with the community
center even at the time of trial. In the same vein, **the mere acquisition of real property**
by a local government is not a major action and has no significant effect on the
quality of the environment. *Marino Prop. Co. v. Port of Seattle, supra* at 831 [88
Wn.2d 822, 831, 567 P.2d 1125 (1977)]. Further, a declaration that real property is
"surplus" and its subsequent *resale* by a governmental body are neither major actions nor
ones having a significant effect on the quality of the environment. As we said in *Marino*,
SEPA is directed at the *use* of property not its *ownership*. *Marino Prop. Co. v. Port of*
Seattle, supra at 831. **Consequently we find no violation of SEPA in the City's**
apparent lack of environmental consideration prior to taking these actions.

³ See Wash. St. Reg. 84-05-020 (amending and codifying the State SEPA rules in WAC Chapter 197-11, effective April 4, 1984).

⁴ See *Marino Property Co. v. Port of Seattle*, 88 Wn.2d 822, 830, 834, 567 P.2d 1125 (1977) (noting that the original codification of the rules in WAC Chapter 197-10 was effective January 16, 1976).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of the following documents:


1. City of Seattle's Reply Regarding its Motion for Reconsideration; and
2. [Proposed, Revised] Order Granting City of Seattle's Motion for Reconsideration,

by messenger to:

J. Richard Aramburu
Aramburu & Eustis, LLP
720 Third Ave., Suite 2112
Seattle, WA 98104
Attorney for Petitioner,

the foregoing being the last known addresses of the above-named parties.

DATED this 17th day of April, 2009, at Seattle, Washington.



Print Name: Debra Hernandez

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL,)	No. 08-2-35092-4 SEA
)	
Petitioner,)	ORDER GRANTING CITY OF SEATTLE'S MOTION FOR RECONSIDERATION AND MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
CITY OF SEATTLE,)	
)	[Clerk's Action Required]
Respondent.)	
)	[PROPOSED; REVISED]

THIS MATTER came before the undersigned judge on a motion for reconsideration filed by Respondent City of Seattle's ("City") asking this Court to reconsider, vacate, and reverse its March 13, 2009 order, which denied the City's cross motion for summary judgment and granted, in part, the cross motion for summary judgment filed by Petitioner Magnolia Neighborhood Planning Council ("MNPC"). See Order Granting Motion of [MNPC] and Denying Motion of [City]. The Court considered the following documents:

1. Land Use Petition and Complaint for Certiorari, Declaratory Judgment, and Injunctive Relief ("Petition");
2. The stipulated record submitted by the parties;
3. [MNPC's] Motion for Summary Judgment;

ORDER GRANTING CITY OF SEATTLE'S MOTION FOR RECONSIDERATION AND MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT - 1

Thomas A. Carr
Seattle City Attorney
600 Fourth Avenue, 4th Floor
Seattle, WA 98104-1858
(206) 684-8200

COPY

- 1 4. [City's] Cross Motion for Summary Judgment and Response to [MNPC's] Motion;
- 2 5. Reply of [MNPC] and Response to City's Summary Judgment Motion;
- 3 6. Declaration of Elizabeth Campbell in Opposition to City Motion for Summary Judgment;
- 4 7. [City's] Reply Regarding its Affirmative Defenses in its Cross Motion for Summary Judgment;
- 5 8. [City's] Motion for Reconsideration;
- 6 9. Reply of [MNPC] to [City's] Motion for Reconsideration;
- 7 10. [City's] Reply Regarding its Motion for Reconsideration; and
- 8 11. the other pleadings and papers related to this matter on file with the Court.

9 Based on the foregoing, the Court FINDS as follows:

- 10 1. There is no genuine issue as to any material fact;
- 11 2. Because the Order Granting Motion of [MNPC] and Denying Motion of [City] was
- 12 contrary to law, did not do substantial justice, and materially affected the substantial
- 13 rights of the City, vacation and reconsideration of that Order is appropriate pursuant
- 14 to CR 59(a); and
- 15 3. Pursuant to CR 56(c), the City is entitled to judgment as a matter of law.

16 NOW, therefore, this Court hereby ORDERS as follows:

- 17 1. The City's Motion for Reconsideration is granted;
- 18 2. The Order Granting Motion of [MNPC] and Denying Motion of [City] is vacated
- 19 and reversed;
- 20 3. The City's motion for summary judgment is granted and judgment is hereby entered
- 21 in favor of the City;
- 22
- 23

- 1 4. MNPC's motion for summary judgment is denied and its action is dismissed with
2 prejudice; and
3 5. Each party shall sustain its own fees and costs.

4 DATED this _____ day of _____, 2009.
5
6

7 _____
8 Hon. Catherine Shaffer

9 **Presented by:**
10 THOMAS A. CARR
SEATTLE CITY ATTORNEY

**Entry approved; Notice of presentation
waived:**
ARAMBURU & EUSTIS, LLP

11
12
13 By: _____

Roger D. Wynne
14 Roger D. Wynne, WSBA # 23399
Assistant City Attorney for Respondent City of
Seattle

By: _____

J. Richard Aramburu, WSBA # 466
15 Attorney for Petitioner Magnolia Neighborhood
16 Planning Council
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