The Honorable Catherine Shaffer
Hearing set for Friday, March 13, 2009 at 9:00 AM

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

MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL, Petitioner, vs. CITY OF SEATTLE, Respondent.	No. 08-2-35092-4 SEA CITY OF SEATTLE'S **REPLY** REGARDING ITS AFFIRMATIVE DEFENSES IN ITS CROSS MOTION FOR SUMMARY JUDGMENT

Contents

Please note: Pursuant to the stipulated order amending the case schedule in this case, this reply is limited to the City's affirmative defenses regarding standing. The City will address the aspects of MNPC's Reply regarding the merits at the hearing scheduled on the cross motions for summary judgment.

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A. MNPC lacks standing to challenge the LRA Application on SEPA grounds.

1. MNPC can allege only speculative injury.

MNPC cannot sustain its burden of demonstrating injury that is immediate, concrete and specific, not merely conjectural or hypothetical. See Harris v. Pierce County, 84 Wn. App. 222, 231-32, 928 P.2d 1111 (1996). Mere proximity to a project site is not sufficient. Cf. Reply at 7. Even the decision invoked by MNPC held that a neighbor of a project site still had to demonstrate "that real, direct injury would result from the County's approval of the...project" to have standing. Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 830, 965 P.2d 636 (1998). In that case, the plaintiffs "[did] not rely on their location alone," but on "specific harms that will result from that proximity." Id. 92. Wn. App. at 831.

MNPC cannot allege specific harm resulting from the City's adoption of the LRA Application because the City cannot dictate or control the decision about the uses that must be made of the Reserve at Fort Lawton as a condition of the federal government transferring that property. Ordinarily, local governments in Washington wield a range of tools to help shape the landscapes and communities within their borders. For example, local governments may enforce their land use regulations, condition or deny applications for new development or uses, and even acquire property outright through condemnation or the implied threat of condemnation. The same is not true of land owned by the federal government, where local governments lack certain basic authority. For example, even though local governments may adopt land use codes that cover federal property, the federal government is exempt from having to comply with those codes on that property, including having to obtain local land use permits for development

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activity.[1] See, e.g., Middletown Twn'p v. U.S. Postal Service, 601 F.Supp. 125, 127-28 (D.C.N.J. 1985) ("the Postal Service is not bound to observe [local] land use regulations"); Town of Groton v. Laird, 353 F.Supp. 344, 350 (D.C.Conn. 1972) ("the Navy is exempt from local zoning ordinances"). Likewise, local governments cannot condemn federal property or purchase it before it is offered voluntarily by the federal government. See 11 E. McQuillin, Municipal Corporations § 32.74 (3d ed. 2000).

Because only the federal government may make the relevant decision, the only role that the City may play in that decision-making process is the role assigned by federal law. See City Opening Brief at 11-13. But for that federal law, the City and the rest of the community, including MNPC, would have to live with the decision made by the federal government without the benefit of local input. Even **with** that federal law, the federal government will make its own decision without local input if the LRA fails to submit a timely LRA Application that complies with statutory mandates to provide for the needs of the homeless. 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. Either with or without local input, the federal government makes the final call.

MNPC therefore can allege nothing but legally-insufficient, speculative injury resulting from the City's adoption of the LRA Application. Until DoD conducts its environmental review of the proposal in the LRA Application—review that will consider a range of alternatives in addition to that proposal[2]—and makes a final decision, there is no way to know whether MNPC

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[1] For this reason, MNPC gains nothing from holding up the City's recent comprehensive plan amendment as evidence that the City can dictate land uses on federal land. Cf. Reply at 6-7. The City is no more able to impose its new comprehensive plan on the Reserve than it could impose the prior version.

[2] MNPC incorrectly suggests that SEPA requires more thorough environmental review than does NEPA. Reply at 15. This suggestion is belied by the fact that SEPA's review requirements "shall not apply when an adequate detailed statement has been previously prepared pursuant to [NEPA], in which event said prepared statement may be utilized in lieu of a separately prepared statement under [SEPA]," RCW 43.21C.150, and that Washington courts

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would be injured. The federal government may opt for a plan that differs from the proposal in the LRA Application—perhaps in ways that address the harms that MNPC anticipates.

2. MNPC's claim is outside the zone of interests protected by SEPA.

Because only the federal government has the authority to take the next and decisive action of any consequence to MNPC's professed interests, and because SEPA does not apply to federal actions, MNPC's interests remain outside the zone of interests protected by SEPA. MNPC's various attempts to drag the City's adoption of the LRA Application back within the ambit of SEPA fail. First, MNPC cannot characterize the adoption of the LRA Application as a "decision to purchase land," which is the only portion of the SEPA definition of "action" to which MNPC now clings. WAC 197-11-704(2)(a)(ii). See Reply at 9. MNPC can only describe the City as having a "plan," or being "on a course," to purchase. E.g., Reply at 3:11, 5:19, 7:24, and 10:25. The City might not follow through on that plan. The City need not acquire any of the land that the federal government might offer. The LRA Application states only that the City expects to negotiate acquisition with the federal government. R289. If the federal government asks too much or imposes inappropriate conditions, the City may decline.[3] It is because no decision about property acquisition can be made at the LRA Application stage that any "binding agreements" entered into at that time between LRAs and providers of services for

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may look to NEPA case law when applying SEPA. See Kucera v. Department of Transp., 140 Wn.2d 200, 223-24, 995 P.2d 63 (2000). The only genuine difference between SEPA and NEPA is that SEPA provides agencies the option, but not a judicially enforceable requirement, to condition or deny projects on the basis of impacts documented in the review process—the so-called "substantive" SEPA authority. RCW 43.21C.060. See Moss v. City of Bellingham, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). SEPA's unique, **optional** "substantive" authority is not germane to MNPC's claim that the City failed to exercise SEPA's **mandate** to document environmental impacts—a mandate that is virtually identical under both SEPA and NEPA.

[3] Citing no authority, MNPC asserts that the City is "the only agency qualified to acquire the site." Reply at 9:26. MNPC is mistaken. Other agencies qualified to acquire land from a former military base include other federal agencies, public or private representatives of the homeless, and the state. E.g., 32 CFR § 174.7; 32 CFR § 176.5 ("communities in the vicinity of the installation" and "local redevelopment authority"); 32 CFR § 176.45(c).

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the homeless must be contingent on the federal government's subsequent actions regarding disposal of the federal property. BRAC Act § 2905(b)(7)(F)(ii)(I).

Second, having found no "action" within the meaning of SEPA, MNPC casts the LRA Application as a "proposal" and reasons that, because "proposal" includes "action," MNPC has standing to challenge the LRA Application under SEPA. See Reply at 10-11 (citing WAC 197-11-784). This chain of logic fails because SEPA allows judicial review only of "actions" and not of "proposals." SEPA's appeal provision opens with this well-worn rule: "Because a major purpose of this chapter is to combine environmental considerations with public **decisions**, any appeal brought under this chapter shall be linked to a specific governmental **action**." RCW 43.21C.075(1)(a) (emphasis added). "This provision precludes judicial review of SEPA compliance until final agency **action** on the **proposal**." State ex rel. Friend & Rikalo Contractor v. Grays Harbor County, 122 Wn.2d 244, 251, 857 P.2d 1039 (1993) (emphasis added; quoting a treatise). Although a "proposal" may exist when it is first conceived, SEPA provides no standing to seek judicial relief until that concept results in a decision that meets the definition of "action."

Finally, because adopting the LRA Application was not an "action" within the meaning or ambit of SEPA, MNPC gains nothing from case law dealing with an "action" (a building permit decision) in a series of governmental "actions" on a project. Cf. Reply at 7 (citing Eastlake Community Council v. Roanoke Associates, Inc., 82 Wn.2d 475, 492, 513 P.2d 36 (1973)). The LRA Application indicates that, when the City takes an "action" dealing with the Reserve—such as the recent comprehensive plan amendment—SEPA will apply. See R299.

B. No law creates a zone of interests sufficient to sustain MNPC's standing to press its 1986 Plan claim.

MNPC suggests that its standing to press its 1986 Plan claim is a function of the merits of that claim. Reply at 16:15. MNPC is mistaken. Standing asks only whether the Court has

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jurisdiction to entertain a claim, but MNPC skirts that question. MNPC offers no retort to settled law holding that policy statements, standing alone, create no enforceable rights or duties. See Judd v. American Tel. & Tel. Co., 152 Wn.2d 195, 203, 95 P.3d 337 (2004). MNPC only points to inapposite case law dealing with policies manifest in comprehensive plans required by statutes that impose duties on local jurisdictions regarding those plans and authorize judicial review. Reply at 18-19. The 1986 Plan is not part of any comprehensive plan within the meaning of those statutes. There is no Washington statute that required adoption of the Plan or that provides a cause of action for a claim about the alleged violation—or even disregard—of this flexible guide that was adopted by a resolution, not by an ordinance, as would be necessary to control City property.

MNPC is disappointed by the City's behavior, but disappointment is not a cause of action. Because neither the Plan nor any other law creates an enforceable right, MNPC is outside any relevant zone of interests sufficient to sustain MNPC's claim of standing.

C. Conclusion and relief requested.

Because MNPC cannot sustain its burden of proving that it has standing to maintain this action, the City respectfully asks this Court to grant judgment to the City and to deny the judgment sought by MNPC. The City has filed a revised proposed order with this reply.

Respectfully submitted March 6, 2009.

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APPENDIX

Definitions of "action" and "proposal" relevant to MNPC's claim of standing under SEPA, with emphasis added.

"Action"; WAC 197-11-704 (excerpt; for full text, see City's Opening Brief at 23-24):

.... (2) Actions fall within one of two categories:

(a) Project actions. A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and **are limited to** agency **decisions** to:

.... (ii) **Purchase**, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

(b) Nonproject actions. Nonproject actions involve **decisions** on policies, **plans**, or programs.

(i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment;

(ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;

(iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), **but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation**....

"Proposal"; WAC 197-11-784:

"Proposal" means a **proposed action**. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants. 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, and the environmental effects can be meaningfully evaluated. (See WAC 197-11-055 and 197-11-060(3).) A proposal may therefore be a particular or preferred course of action or several alternatives. For this reason, these rules use the phrase "alternatives including the proposed action." The term "proposal" may therefore include "other reasonable courses of action," if there is no preferred alternative and if it is appropriate to do so in the particular context.

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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 this document and the following documents:

1. [Proposed and Revised] Order Granting City of Seattle's Motion for Summary Judgment and Denying Petitioner's Motion for Summary Judgment;
2. Index to Record; and
3. Copies of Non-Washington Authorities Cited In Cross Motions For Summary Judgment,

by messenger to:

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

DATED this 6th day of March, 2009, at Seattle, Washington.

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