Honorable Catherine Shaffer

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

MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL, a Washington nonprofit corporation, Petitioner, v. CITY OF SEATTLE, Respondent.	NO. 08-2-35092-4SEA REPLY OF MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL TO CITY OF SEATTLE'S MOTION FOR RECONSIDERATION

I. INTRODUCTION.

The City has filed a motion for reconsideration from the decision entered by this Court on March 13, 2009. The verbatim oral ruling of the court is attached hereto to allow the court to reference the ruling that the City seeks to reconsider.

The City's motion does not take issue with any of the Court rulings on the denial of the City's motion for summary judgment or granting of the summary judgment motion filed by the Magnolia Neighborhood Planning Council (MNPC). Rather, the City attempts to raise an entirely new issue, asserting for the first time in these proceedings that the City's decision is "categorically exempt" from the SEPA rules.

The City's motion should be rejected for two reasons. First, it cannot raise

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a new theory of its case and a new issue of law in a motion for reconsideration. Second, even if the Court were to consider the new issue, it should also be dismissed. The action of the City, in its proposal to both purchase real property and to also approve a specific redevelopment plan, is not exempt from SEPA review.

II. THE CITY'S ATTEMPT TO RAISE A BRAND NEW ISSUE ON RECONSIDERATION SHOULD BE DISMISSED.

As is seen from the City's motion, the City now claims that its actions on the Fort Lawton Redevelopment Plan ("FLRP") and the proposal to purchase the property from the federal government are exempt from SEPA review. The City cites WAC 19-11-800(5)(a), but there has been of that citation to that authority in any of the City's prior briefing, nor a specific, or even a general, argument that the City's actions were "categorically exempt." Indeed, the City has agreed that this matter can be resolved on the issues raised in the opposing motions for summary judgment, and this issue was neither raised nor even discussed.

Washington law is very clear that a party cannot use a motion for reconsideration to bring forth new and novel theories not previously raised in the litigation. As our Court has said: "[T]he post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment ... under CR 59." *Vaughn v. Vaughn*, 23 Wn.App. 527, 531, 597 P.2d 932 (1979) (plaintiff sued her insurance company for bad faith in handling her tort action; after trial court ruled against her, she moved for reconsideration on an alternative theory of recovery). Nor does CR 59 "permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case." *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999) (JDFJ moved for reconsideration alleging that it was entitled to treble rather than single damages under a different statute not raised in its complaint).

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The *JDFJ* court held that:

> JDFJ's motion for reconsideration was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of remedies, and the invited error doctrine.

97 Wn.App. at 7.

The City argues that it was not aware of the claims presented by MNPC. Indeed the City argues "that it did not have an opportunity to brief" MNPC's claim that the FLRP was a project action under SEPA. Motion at 1. This is so, the City says, because MNPC adopted a "variant of its original second argument." Motion at 3. This is not correct; the City's Reply at page 3 addressed this issue specifically. Moreover, MNPC was clear in its original motion for summary judgment that the City's proposal to purchase real property, as a part of the adoption of the FLRP, required SEPA compliance, as stated in MNPC's summary judgment motion at page 16: "It [the FLRP] is a 'project action' because it involves the 'purchase ... . of publicly owned land' and will involve its sale to private developers, meeting the definition of 'action' under WAC 197-11-704(2)(ii)." Indeed, the City specifically responded to this argument at pages 27-28 of its Cross Motion for Summary Judgment and Response to Petitioner's Motion. The position of MNPC could not be more clear and could not have confused the City.

Attempts to raise new issues following the submission of summary judgment motions should be rejected by the Court.

III. THERE IS NO EVIDENCE IN THE RECORD THAT THE CITY EVER CONSIDERED ITS ACTIONS CATEGORICALLY EXEMPT.

As described above, the Court should not entertain this reconsideration motion because the motion attempts to raise brand new issues, not previously presented as a part of the City's motion. However, even if the Court does

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consider the merits of the City's motion, it should be denied and the March 13, 2009 decision and order should stand.

In a nutshell, the City argues that the adoption of the FLRP should be considered "categorically exempt" under the SEPA Rules. The City does not deny, for purposes of its motion, that embarking on a decision to purchase real property is an "action" under WAC 197-11-704(2) (a) ("a project action involves a decision on a specific project . . . [including] . . . (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified."). This Court has correctly determined that the City, by adopting the FLRP, is taking steps to acquire the Army Reserve Center from the Federal Government. This was in part based upon the mandate of the SEPA Rules that the SEPA Process begin at the "earliest possible time":

> The lead 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, when the principal features of a proposal and its environmental impacts can be reasonably identified.

WAC 197-11-055(2). As explained at pages 12-13 of MNPC's summary judgment motion, the whole point of the SEPA process is to use the products of the SEPA process as a part of decision making. As the Court has correctly concluded, the "principal features" of the FLRP are provided in great detail.

Notwithstanding these conclusions, the City asserts that Resolution 31086, which "adopts and approves" the FLRP, is categorically exempt under WAC 197-11-800(5)(a) because it involves the purchase or acquisition of real estate.[1] As noted above, this argument was never made by the City in its

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[1]While the term "City" is used throughout this response, it should be clear that it was the Seattle City Council that made the decision to adopt and approve the FLRP,

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summary judgment motion, nor in its response to MNPC's motion. Nor was it made at any time by the City Council in the FLRP itself. To the contrary, the City made clear that the proposal would be subject to SEPA later in the process. See Record, page 299. Once again, this argument is made up entirely by counsel, yet another post-hoc rationalization of the City's action. As MNPC demonstrated in its Reply to the City's summary judgment motion (see page 18), courts "may not accept appellate counsel's post hoc rationalizations for agency action." See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463, U.S. 29, 50, 103 S.Ct. 2856 (1983) as cited in *Aviation West Corp. v. Washington State Dept. of Labor and Industries*, 138 Wn.2d 413, 436, 980 P.2d 701 (1999). Indeed, *State Farm* requires that agency decisions be upheld, "if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. Nowhere in this record, much less in Resolution 31086, or the FLRP itself, did the City claim its actions were "categorically exempt."

Since the City Council never claimed that its actions were categorically exempt under the FLRP or any other document, there is no governmental action or decision to review and the court should not entertain the eleventh hour, after the fact, argument as to what the City Council did.

IV. AS A TRANSFER OF PUBLICLY OWNED LAND, SUBJECT TO AN AUTHORIZED PUBLIC USE, THE FLRP IS NOT CATEGORICALLY EXEMPT UNDER WAC 197-11-800(5)(b).

Again, the Court should not consider arguments regarding categorical exemptions because, as described above, this issue was not raised in the original summary judgment motion by the City and also because there is nothing in the record that suggests that the City Council, as decision maker, ever thought its action was categorically exempt. Even if the Court considers the argument,

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not the City Attorney's office that represents the Council in this litigation.

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the City's motion should be denied.

The City claims that the FLRP is exempt because it is a "purchase or acquisition of any right to real property" under WAC 197-11-800(5)(a).[2] However, the City ignores the fact that the definition of "project action" in WAC 197-11-704(2)(a)(ii) refers to the "[p]urchase, sale, lease, transfer or exchange natural resources, including publicly owned land".[3] Accordingly, it is not subsection 5(a) of WAC 197-11-800 that might apply here, but subsection 5(b), which reads:

> The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to an authorized public use.

The City admits in footnote 3 on page 5 that the property is subject to a public use at this time, i.e., a military base. The City glibly states that it will transfer "any Fort Lawton land to others," in that same footnote, apparently arguing the property will not be subject to public uses after the FLRP is implemented. But the plan states that substantial portions of the site will remain in authorized public uses including forested avian corridors and the "Texas Way West Corridor" which is "proposed to become a public city street." FLRP page 6-2, Record p. 249. In addition there will be new public parks and greenways. *Id.* Fort Lawton is now publicly owned and subject to an authorized public use and portions of it will be publicly owned and subject to new authorized public uses. Accordingly the proposal, involving publicly owned land, subject to authorized public use, is not exempt.

V. THE CITY DECISION IS NOT CATEGORICALLY EXEMPT UNDER THE TERMS OF WAC 197-11-305

The City also fails to mention that the categorical exemptions are not

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[2]There, reference to "any right" refers to warranty deeds, quit claim deeds, easements or other transfers of rights in property.

[3]The term "natural resources" is not defined in the SEPA Rules.

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applied unless they meet the test of WAC 197-11-305(1). In that rule, it is plainly stated that categorical exemptions do not apply if the following criterion is met:

> (b) The proposal is a segment of a proposal that includes:
> (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not; or . . . .

This rule plainly and obviously applies to this case based on both past and future intended actions.

First, as to past actions, as described in the record, the City already completed the first steps or "action" for the acquisition of the Army Reserve FLRP when it changed the comprehensive plan designation from single family residential to multi-family residential in 2007. When the City processed the comprehensive plan change, it prepared both a SEPA environmental checklist (Record p. 135-154) and a threshold determination (Record p. 156-164). These actions were obviously not categorically exempt and the City did not claim them as such. Indeed, the checklist explained precisely why the comprehensive plan was being changed:

> In Magnolia, a proposed amendment to the Future Land Use Map would change the designation of a portion of the Fort Lawton U.S. Army Reserve Complex from single family residential area to multifamily residential area to enable a future rezone suitable for the development of a self-help housing facility primarily serving the homeless.

Record p. 145. Indeed, as described in detail at pages 14-16 of MNPC's motion for summary judgment, the City committed to full SEPA compliance when it came up with a more detailed proposal for the Army Reserve site, saying:

> If the City, as the Designated Local Reuse Authority, selects a project proposal for the Fort Lawton site, that project will be subject to SEPA review.

The City has now selected, "adopted" and "approved" (Record p. 322) a specific project in the form of the FLRP; the City must fulfill its promise to conduct SEPA

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review as promised during the comprehensive plan amendment process.

Second, as to future actions, the City has plainly stated that SEPA analysis will be required -, *i.e.* not categorically exempt - when rezone and development permits are sought. This is stated right in the FLRP. See Record at p. 299.

The City is now trying to pick out the FLRP, sandwiched between the past, completed step (amending the comprehensive plan) and the future step (rezone/and other land use approvals), neither of which are categorically exempt, and allege that the FLRP itself is exempt. The terms of WAC 197-11-305 do not permit such an obvious twisting of the law, which also ignores the reality of the City's stated plans. The City's adoption of the FLRP and its plans to acquire the Fort Lawton property are not categorically exempt.

The City also cites caselaw at page 5 of its motion, but none of it is on point. *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006) is not a SEPA case at all, but rather a condemnation case. Arguments there centered around public use and necessity and notice issues as noted by the court in its issues statement at 156 Wn.2d at 409. In any event, full environmental review already took place. Any reference to SEPA is clearly *dicta*, even the Court saying that its SEPA comment was made "in passing." 156 Wn. 2d at 421.

Similarly, in *Yakima County v. Evans*, 135 Wn.App. 212, 143 P.3d 891 (2006) the issue was not whether SEPA applied. In fact, the County had already complied with SEPA: "The Evanses assert that the SEPA checklist and finding of a Final Determination of Non-significant were inadequate and erroneous." 135 Wn.App. at 220. Thus the Evans were challenging whether SEPA compliance was adequate and complete and whether "a second environmental review

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invalidated the Final Determination of Non-significant (sic)." 135 Wn.App. at 221. Evans dealt with substantive compliance, not whether SEPA actually applied.

Petition of Port of Grays Harbor County, 30 Wn.App. 855, 638 P.2d 633 (1982) was another condemnation case. Again, the public agency had complied with SEPA, but the petitioner was attempting to collaterally challenge the environmental review in a condemnation proceeding. This is clear from the court's opinion:

> In the present case, collateral attack on the Port's attempted compliance with SEPA in amending its Comprehensive Scheme is unavailable for the reasons set forth in *Brannan*. The proper place to raise the issues of the environmental impact of the Port's project is at the administrative level and not at the hearing on the application for public use and necessity. To hold otherwise would be to allow an impermissible collateral attack on the prior administrative determination.

30 Wn.App. at 866. The Court also ruled that any challenge to SEPA compliance was barred by the statute of limitations. 30 Wn.App. at 866-867. Once again, the issue of whether SEPA applied was not presented.

Finally, the City cites *Lassila v. Wenatchee*, 89 Wn. 2d 804, 576 P.2d 54 (1978). However, the essential holding in *Lassila* on this point has been overruled. *Lassilla* held that "SEPA is directed at the *use* of property not its *ownership*" and "that the City had no definite plan to proceed with the community center even at the time of trial." 89 Wn.2d at 815. The holding that the lack of plans for development precludes SEPA review has been overruled in *King County v. Washington State Boundary Review Board for King County,* 122 Wn. 2d 648, 663, 860 P.2d 1024, 1032 (1993). Further, under the SEPA Rules, the purchase of real property is a project action "whether or not the environment is directly modified." WAC 197-11-704(2)(a)(ii).

The City does cite *Dioxin/Organochlorine Center v. Pollution Control Hearings Board,* 131 Wn. 2d 345, 932 P.2d 158, 167 (1997), but misstates the

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holding. As the Court said at page 365:

> The courts may still decide if the categorical exemption contained in the rules meets this criteria. The courts may also decide whether a specific proposed action actually fits within the particular categorical exemption.

None of these cases deal with whether a combination of actions, as here, including comprehensive plan amendments, approval of a redevelopment plan leading to property acquisition and future rezone, are categorically exempt.

The case of *Foster v. King County,* 83 Wn. App. 339, 921 P.2d 552, 557 (1996) dealt with the interface between WAC 197-11-305 and categorical exemptions. There the property owner asserted that the construction of a large pond was for irrigation purposes and thus categorically exempt from SEPA compliance. The owner cited to the SEPA Rules, which provides that decisions pertaining to applications for appropriation of not more than fifty cubic feet of water per second are exempt from SEPA requirements, which the Rules extend to permits required for normal diversion or intake structures and "activities relating to construction of a distribution system solely for any exempted appropriation[.]" WAC 197-11-800(4). However, the applicant also intended to use the "irrigation" pond for water skiing, a non-exempt use. The King County Hearing Examiner and trial court agreed that though one segment of the project was exempt (the appropriation and irrigation features), because the use of the pond for water skiing was not exempt, the whole proposal was not exempt. The court said:

> As the hearing officer pointed out, even if the pond is part of a distribution system for the appropriation of water, irrigation is not the pond's sole purpose. The water-ski use is not categorically exempt and categorical exemptions do not apply to actions that are a mixture of exempt and non-exempt activities. See WAC 197-11-305(1). Thus, the action is not clearly contrary to law.

83 Wn.App. at 348.

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Consistent with *Foster*, in this case, even if the purchase of the real estate was exempt, the City admits that its comprehensive plan amendments, zoning amendments and development approvals necessary to carry out the City's overall plan were not exempt. Accordingly, the overall action is not exempt.

VI. THERE IS NO BASIS STATED FOR RECONSIDERATION OF THE COURT'S RULING ON THE DISCOVERY PARK PLAN.

At page six of its motion, the City also asks that the court reconsider its decision on the Discover Park Master Plan. This argument is based on the proposition that the Court's ruling was based on SEPA. *Id.* However, the Court's analysis, as found in the attached oral ruling, did not appear to be based on SEPA but on separate authority cited by MNPC. Accordingly, there is no basis to reconsider the ruling.

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VII. CONCLUSION.

The City's reconsideration motion should be denied. First, the motion attempts to bring new theories of law into the case after the decision of the court, contrary to established Washington law. Second, even if the motion is to be considered, it should be denied because the asserted categorical exemption is a part of necessary City approvals that are not exempt under the SEPA rules, making the categorical exemption provisions inapplicable to the current situation under WAC 197-111-305. Third, there is no basis for the Court to reconsider its ruling regarding the Discovery Park Master Plan.

An order denying the City's motion is attached.

DATED: APRIL 10, 2009

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Honorable Catherine Shaffer

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

MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL, a Washington nonprofit corporation, Petitioner, v. CITY OF SEATTLE, Respondent.	NO. 08-2-35092-4SEA ORDER DENYING CITY OF SEATTLE'S MOTION FOR RECONSIDERATION [PROPOSED]

This matter came on for hearing without oral argument on May 30, 2009 on the City of Seattle's Motion for Reconsideration in the above-captioned matter. MNPC appeared through J. Richard Aramburu of Aramburu & Eustis LLP and Roger D. Wynne, Assistant City Attorney, appeared for the City of Seattle.

The parties submitted the following documents for the Court's review and consideration:

City of Seattle's Motion for Reconsideration

Reply of Magnolia Neighborhood Planning Council to City's Motion for Reconsideration

[City of Seattle's Response to MNPC's Reply to Motion for Reconsideration]

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and accompanying declarations and attachments.

Having reviewed the documents provided and having heard the argument of counsel and being fully advised, the Court hereby ORDERS:

1. The motion of the City of Seattle for Reconsideration is denied.

DONE IN OPEN COURT this _____ day of April, 2009.

_____
The Honorable Catherine Shaffer

PRESENTED BY:

ARAMBURU & EUSTIS LLP

_____
J. Richard Aramburu
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APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED

_____
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