

No. 63466-6-I

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

Magnolia Neighborhood Planning Council,

Respondent,

vs.

City of Seattle,

Appellant.

CITY'S OPENING BRIEF

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I. INTRODUCTION

Appellant City of Seattle (“City”) respectfully asks this Court to reverse the trial court’s grant of Respondent Magnolia Neighborhood Planning Council’s (“MNPC’s”) cross motion for summary judgment, and to order that judgment be entered for the City.

This case deals with a federal agency’s decision about the terms under which it will dispose of a federal military facility pursuant to a comprehensive federal statutory and regulatory scheme that requires review of environmental impacts under federal law as a condition for that decision. Because Congress created this scheme—replete with strict deadlines—to break the litigation and political logjams that stymied past base closure efforts, federal courts across the nation have recognized that even they may play no role in the closure process until it has run its course.

The only role played by the City in that process is the one prescribed by federal law: to conduct a thorough public outreach process and submit an application (“LRA Application”) to the federal government proposing a range of uses for the facility that balance community needs and the needs of the homeless. The details of the ultimate base closure decision remain in the hands of the federal government.

Through this action, MNPC attempts to shape that federal decision by using Washington's State Environmental Policy Act ("SEPA") and a master plan for a City park adjacent to this federal facility ("1986 Park Plan") to dictate the procedure and substance of the City's limited role in the federal process. The City respectfully asks this Court to reject that attempt because MNPC lacks standing and its claims lack merit.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by granting MNPC's cross motion for summary judgment and denying the City's cross motion for summary judgment.
2. The trial court erred by denying the City's motion for reconsideration.

B. Issues Pertaining to Assignments of Error

1. Does MNPC lack standing to maintain this action where its claims of injury are based on speculation about future actions of the federal government, and where MNPC's interests are outside the zone protected by SEPA and the 1986 Park Plan? (Assignment of Error 1.)
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3. Even if MNPC had standing, would its 1986 Park Plan claim fail because the LRA Application is consistent with that Plan and no procedural requirement to discuss the Plan exists? (Assignments of Error 1 and 2.)

III. STATEMENT OF THE CASE

A. The evolution of plans for Discovery Park's northeastern flank.

The City owns Discovery Park, which was originally and briefly known as Fort Lawton Park. For use by the Army Reserve, the United States Department of Defense (“DoD”) owns a base that bounds the park along its northeast flank (“Reserve”). See R199.¹

A series of four roads is located in the vicinity of the Reserve. See App. 1; App. 2 (Key Nos. 1-4). Three roads (Illinois and Washington Avenues within the park, and Government Way outside it) form a lopsided “U” that cradles the Reserve. Extending away from the upper right of the “U” at the end of Government Way is Gilman Avenue West, which bends back to the southeast.

1. The unadopted 1972 Plan: A proposal to convert the Reserve property into park land and construct a grand entrance with a bridge over Kiwanis Ravine.

In 1972, an architectural firm submitted to the City a “final report on the Master Plan for Fort Lawton Park” (“1972 Plan”), which the authors described as “a policy document, which should be used as a guide

¹ The City designated the 468-page document to which the trial court assigned “Sub Number” 17 and the description of “Index to the Record.” This is the agreed record submitted by the parties to the trial court. Because the trial court has not assigned individual CP numbers to the documents in that record—and has instead forwarded the record to this Court with the existing numbering provided by the parties—this brief will refer to those documents using “R” to denote the relevant record page numbers.

for making decisions regarding immediate and long range physical development of the Park.” R002. For “Phase I,” the 1972 Plan called for the east entry of the park to be where Government Way meets Washington, at the southern tip of the Reserve. R022 (“Phase I” map); R022A (text). The 1972 Plan also manifested a grander, “long range” vision; assuming that the City would acquire the Reserve property, the 1972 Plan called for a grand mall within the park and running through the northern Reserve property to a new “Main Park Entry.” App. 3 (R016, R318; “Long Range” map); R022A (text). Leading to the mall outside of the park—spanning the top of the “U” formed by the existing roads—would be an ambitious extension of West Gilman by use of a new bridge over Kiwanis Ravine. The City Council took no action on the 1972 Plan.

2. The adopted 1974 Plan: A long-range plan that leaves most of the Reserve outside the park, and abandons the grand entrance.

The architect soon presented the Mayor with a “Revised Master Plan” (“1974 Plan”). R047. The purpose of the 1974 Plan was to reevaluate certain elements of the 1972 Plan “in light of policies and developments that have materialized since the [1972] Plan was proposed” as a result of detailed study and negotiation with the Army. R047, R049.

Among the revisions was removing from the “long range” plan the vision of a mall extending through the Reserve property to a grand

entrance via an extended W. Gilman Avenue. Compare App. 4 (R051; 1974 Plan “Long Range” map) with App. 3 (R016; 1972 Plan “Long Range” map). In place of the grand mall entrance, the long-range plan now called for a “Main Park Entry” on the east park boundary at Government Way.² See App. 4. Unlike the “Long Range” map in the 1972 Plan, which showed the Reserve property as part of the park, see App. 3, the “Long Range” map in the 1974 Plan displayed the Reserve property as the only “Army Retained Area” on the map, with just the northwest segment of that property displayed as “Army Property Requested for Park Use.” See App. 4.

In 1974, the City Council adopted the 1974 Plan by resolution, noting that the plan was a “guide” for making decisions about the park. R043 (second recital).

3. The revised 1986 Plan: Abandonment of long-range ambitions to acquire the Reserve.

In 1986, the Council revised the plan, again by resolution (“1986 Park Plan” or “1986 Plan”). R073. The Plan described itself as “a policy document, which is to be used as a guide for making decisions regarding the development of Discovery Park.” R080. The 1986 Plan cautioned that

² The 1974 Plan’s “Long Range” map also depicts two “Secondary Park Entrances”: one where Illinois meets Lawton, and the other along the southern boundary of the park. See App. 4. The secondary entrances are not relevant to this dispute.

was “conceptual” and must remain “flexible and general.” *Id.* As part of its “Long Range Development Plan,” the 1986 Plan incorporates, as a “fundamental element,” the less ambitious park entry scheme from the 1974 Plan: “a main entrance from the city on the east (with secondary entrances on the north and south).” R083. Referring to the main entrance at the confluence of Washington Avenue and Government Way as the “East Gate” of the park, the 1986 Plan calls for working with the Army and nearby residents to develop improvements to make it a safe and suitable entry for a great park. R101.

The 1986 Plan makes no mention of the grand mall entrance through the Reserve property that was abandoned in the 1974 Plan. Consistent with the “Long Range” map in the 1974 Plan, which shows the Reserve property as the only “Army Retained Area” (*see* App. 4) and which the 1986 Plan did not amend, the 1986 Plan expressly abandons long-range ambitions to acquire the Reserve. R098.

By contrast, the 1986 Plan targets acquisition of two other pieces of military property: the “500 Area” and the Capehart Housing development. R098-099. Unlike the Reserve, which is adjacent to the park, both of these properties are surrounded by the park. The 1986 Plan deemed their acquisition “essential,” *id.*, and the City Council ultimately adopted ordinances authorizing their acquisition. R116, R344.

4. Changed circumstances near Discovery Park after the 1986 Plan preclude the 1972 grand mall entrance vision.

Two developments after the adoption of the 1986 Plan further relegated to historical irrelevance the proposals in the 1972 Plan to convert all of the Reserve property into part of the park and to create a grand mall entrance through that property and over Kiwanis Ravine.

First, the City Council took a number of steps to preserve the ravine as a park. See R233 (site of Kiwanis Memorial Preserve Park). Through a 1994 ordinance, the Council authorized acquisition of property in the ravine for park purposes. R329. In 2006, the Council adopted an ordinance transferring the street rights of way over the ravine—including Gilman, which the 1972 Plan envisioned extending for the grand mall entrance—from the City Department of Transportation to the Parks Department. R337. In 2007, the Council sealed the fate of the ravine—deeming it “important open space and heron habitat”—by imposing on it a restrictive easement that limits its use to park purposes. R351.

Second, in the late 1990s, the federal government built a new Fort Lawton Army Reserve Center (“FLARC”) facility in the northwest quadrant of the Reserve property, directly in the path of the erstwhile grand mall. R197. Compare App. 3 (1972 Plan “Long Range” map with the grand mall entrance) with R241 (map depicting the FLARC site in

light shading north and east of “E - Potential Additional Forest Parcel”).
See R240 (“There is a forested area to the south and west of the building being retained for use by the Department of Veterans Affairs (shown as E on [R241]).”) The federal government plans to retain the 8.5 acres that comprise the FLARC building and its adjacent parking area for use by the Department of Veterans Affairs (“VA”) for clinical and administrative purposes. R199, R207. See 32 CFR § 174.7 (process for DoD to identify property on bases slated for closure for use by other federal agencies).

B. The comprehensive federal statutory and regulatory scheme dictating the timing and process of military base closures.

In 1990, Congress adopted the Defense Base Closure and Realignment Act of 1990, still known colloquially as the “BRAC Act.” Pub. L. No. 101-510, Title 29, Part A (codified as amended in a note following 10 U.S.C. § 2687). Congress intended the BRAC Act to overcome repeated and unsuccessful efforts to close military bases in a rational and timely manner and to “provide a fair process that [would] result in the timely closure and realignment of military installations.” BRAC Act § 2901(b). Conference reports on the BRAC Act stated that earlier base closures had “take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court,” that “[e]xpedited procedures...are essential to make the base closure process

work,” and that the BRAC Act “would considerably enhance the ability of the Department of Defense...promptly [to] implement proposals for base closures and realignment.” Dalton v. Specter, 511 U.S. 462, 479 n.1, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (Souter, J., concurring; quoting H.R. Conf. Rep. No. 101-923 at 705, 707 (1990) and H.R. Rep. No. 101-665 at 384 (1990)).

The BRAC Act has been amended and extended several times, but its essential, three-phase structure has remained the same. See generally R403-R406 (2005 BRAC Commission Report, discussing the history of federal base closure statutes).

1. Phase One: Congress’s deadline-driven, all-or-nothing decision on a slate of base closures.

The first phase results in an all-or-nothing decision on a slate of military facilities to close and consolidate. For the current round of base closures, this phase began when the Secretary of Defense certified to Congress that there was a need to close and realign military installations and that such action would “result in annual net savings for each of the military departments.” BRAC Act § 2912(b)(1)(B). The President then had until May 15, 2005, to nominate commissioners for Senate confirmation. Id. § 2912(d). By May 16, 2005, the Secretary had to submit to the Commission a list of U.S. military installations

recommended for closure or realignment. Id. § 2914(a). After conducting public hearings, the Commission had to transmit its own report to the President by September 8, 2005. Id. §§ 2903(d), 2914(d). The President had until September 23, 2005 to either approve or disapprove the Commission's recommendations in their entirety. Id. § 2914(e). If the President had disapproved the Commission's recommendation, the Commission could have sent a revised list by October 20, 2005. Id. Upon receipt of the President's approval, Congress had 45 days to enact a joint resolution disapproving the Commission's recommendations. Id. § 2904(b).

2. Phase Two: DoD's deadline-driven decision on the uses to be made of each closed base, and the supporting roles played by the LRA and HUD.

In the second phase—which is at issue in this case—DoD must make decisions on how to implement the package of closures and realignments. DoD had to initiate this phase within two years of the date the President transmitted approval of the Commission's recommendations to Congress, and has to close all bases slated for closure within six years of that date. Id. § 2904(a)(4)-(5). DoD therefore has adopted a policy to “act expeditiously” to close bases. 32 CFR § 174.4.

a) DoD's initial responsibilities.

In addition to imposing a tight timeline, Congress also directed DoD, when making decisions about how to dispose of bases, to balance the needs of other federal agencies, the development and public use preferences of local communities, and the needs of homeless families and individuals in the vicinity of the base. See BRAC Act §§ 2905(b)(5)(A)-(B), (b)(5)(H), and (b)(7)(B). Every procedural and substantive step in this balancing act is detailed in lengthy federal statutes, regulations, and manuals. See, e.g., BRAC Act § 2905; 32 CFR Part 174 (DoD regulations); 32 CFR Part 176 (additional DoD regulations); 24 CFR Part 586 (HUD regulations)³; Base Development and Realignment Manual ("DoD Manual," 2006).⁴

Among the initial steps is determining whether any other federal agency could make use of some or all of the base property. Where transfer of base property to other federal agencies is appropriate, DoD will not make that property available to others. BRAC Act § 2905(b)(5)(A)-(B), (7)(B); 32 CFR § 174.7.

³ The HUD regulations are substantively identical to the DoD regulations at 32 CFR Part 174. The City will therefore cite only the DoD regulations.

⁴ "This Manual is effective immediately and is mandatory for use by all the DoD Components." DoD Manual at 2. See 32 CFR § 174.1(b) (authorizing publication of the DoD Manual).

b) The LRA's tightly prescribed role.

For the rest of the balancing act, Congress provided DoD assistance from at least two other players. One of them is the entity known as the Local Redevelopment Authority ("LRA"), which Congress tasks with proposing a redevelopment plan that strives to balance the needs of the various communities for economic redevelopment, other development, and homeless assistance. See 32 CFR § 176.1. DoD must designate an LRA as soon as practicable after the slate of base closures is finalized. 32 CFR § 176.20.

The legion requirements and strictures placed on an LRA can be grouped into three components. First is the process of identifying interest in the base property from providers of services to the homeless, and then reaching agreement with qualified providers on proposals to use the base to meet the needs of local homeless populations. See generally BRAC Act § 2905(b)(7)(C)-(F); 32 CFR § 176.20. This involves formal outreach efforts (including publications of notices), consultation with social service providers, and help with assessing the available property to meet the needs of the homeless. Representatives of the homeless are given six months after the LRA provides formal notice to submit notices of interest ("NOIs") to the LRA. An NOI is a detailed description of the proposed homeless assistance program. Among many other things, the NOI must

detail the need for the program, its physical requirements, and a financial plan for implementing it. After assessing the NOIs, the LRA and qualified representatives of the homeless must prepare legally binding agreements that provide for the use of base property to assist the homeless. Because implementation of any homeless assistance program is ultimately subject to federal amendment and approval, the LRA and homeless representatives need not actually enter the binding agreements, and any agreement must be “contingent upon the [DoD] decision regarding the disposal of the buildings and property covered by the agreements.” BRAC Act § 2905(b)(7)(F)(ii)(I).

Second, while working with homeless providers, the LRA must prepare what Congress calls a “redevelopment plan.” See generally BRAC Act § 2905(b)(7)(F); 32 CFR § 176.20. The LRA must consider input on community interests in future use of the base property, including those institutions that might qualify for “public benefit transfers”—free property for certain public-interest uses other than support for the homeless. The LRA must engage in a detailed public outreach effort as part of its plan formulation process. The redevelopment plan should address numerous factors, including: sustainable redevelopment supported by a coordinated management plan; overall redevelopment of the installation in a comprehensive and coordinated manner; proposed

land uses, including development controls, such as zoning; possible future property recipients or tenants; current and projected market demand for different potential land uses; sources and uses of available funding or revenue; personal property necessary to support redevelopment; and how the redevelopment plan takes account of past land uses and current property conditions. DoD Manual at 34.

Finally, the LRA must put together the fruits of its first two tasks into an application submitted to the U.S. Department of Housing and Urban Development (“HUD”). See generally BRAC Act § 2905(b)(7)(G); 32 CFR § 176.30. The application must include: a summary of the LRA’s outreach efforts; a copy of the redevelopment plan, including a summary of any public comments on the plan and of the LRA’s consultations with representatives of the homeless; a copy of each NOI from representatives of the homeless; an assessment of how the plan addresses the interests expressed in each NOI and balances those interests with the need of the communities in the vicinity of the base for economic redevelopment and other development; and copies of the LRA’s agreements (or draft agreements) with representatives of the homeless. The LRA must submit the application to HUD within nine months of having been designated as the LRA, unless DoD grants an extension that is “in the interests of the communities affected by the closure.” BRAC Act § 2905(b)(7)(F)(iv),

(N). If the LRA fails to submit a timely application, DoD will proceed to make a decision on post-closure uses of the base without the benefit of LRA input. 32 CFR § 174.6 (c)(2); DoD Manual at 99 ¶ C8.2.3.4.

c) HUD's gatekeeper function.

In addition to the LRA, Congress assigned HUD a key part in the base closure process. In addition to consulting and negotiating with the LRA in the formulation of its application, HUD's primary role is to review the application and approve it if it conforms to Congress's procedural and substantive mandates. See generally BRAC Act § 2905(b)(7)(H)-(J); 32 CFR §§ 176.25, 176.35. HUD must complete its review within 60 days of receiving an application. If the application does not conform to Congress's mandates, the LRA has 90 days to submit a revised application, which HUD must review in 30 days. If an LRA fails to submit an application that HUD approves, HUD and DoD will proceed without further input from the LRA. BRAC Act § 2905(b)(7)(L); 32 CFR § 176.40; DoD Manual at 99 ¶ C8.2.3.4.

d) DoD's environmental review under NEPA and final decision on future use of the base.

Once HUD completes its review, and assuming it approves the application, DoD takes over. DoD must first conduct environmental review of the base closure pursuant to the National Environmental Policy

Act, 42 U.S.C. 4321 et seq. (“NEPA”). See generally BRAC Act § 2905(c); 32 CFR § 174.17. DoD must consult with the LRA throughout DoD’s NEPA review process and must treat the LRA’s redevelopment plan, including the proposed uses to support homeless communities, as “part” of the DoD action for purposes of NEPA review. BRAC Act § 2905(b)(7)(K)(ii); 32 CFR § 176.45(b). But the redevelopment plan will remain just one of the alternatives that DoD will evaluate:

In preparing [its NEPA] analysis, [DoD] must develop the proposed Federal action, which will include the redevelopment plan, and then consider a range of reasonable disposal alternatives and assess their environmental effects in the context of the reasonably foreseeable reuse of the property.

DoD Manual at 99 ¶ C8.2.3.3. To the extent practicable, DoD must complete its NEPA review process within 12 months of receiving the redevelopment plan. Pub. L. 103-160, Div. B, Title 29, § 2911, 1993 (codified as amended in a note following 10 U.S.C. § 2687).

To ensure that NEPA is not used to delay base closures unfairly, Congress included a 60-day limitations period on any suit challenging DoD compliance with NEPA related to a base closure. BRAC Act § 2905(c)(3). This is unique under NEPA, which contains no limitations period. See Sierra Club v. Slater, 120 F.3d 623, 630 (6th Cir. 1997).

After completing environmental review, DoD finally renders its decision on uses for the base. Consistent with NEPA, that decision is memorialized in a “record of decision” (“ROD”). “The ROD indicates what disposal action has been selected, the alternatives considered, the potential environmental impacts, and any specific mitigation activities to support the decision.” DoD Manual at 98 ¶ C8.2.2.3.5. In the ROD, DoD must give substantial deference to the redevelopment plan. BRAC Act § 2905(b)(7)(K)(iii). Nevertheless, DoD “always retains ultimate responsibility and authority to make the final property disposal decisions.” DoD Manual at 28 ¶ C2.5.4.

3. Phase Three: Implementing DoD’s decision by the Congressional deadline.

The third phase of the base closure process involves implementing the ROD within Congress’s six-year deadline. See BRAC Act § 2904(a)(5). Disposal must be in accordance with the ROD, which DoD may amend. Id. § 2905(b)(7)(K)(iii); DoD Manual at 28 ¶ C2.5.2, at 99 ¶ C8.2.3.5.

DoD must convey buildings and property to be used as homeless assistance facilities, without consideration, to either the LRA or directly to representatives of the homeless. BRAC Act § 2905(b)(7)(K)(iv); 32 CFR § 176.45(c). The LRA is responsible for compliance with, and the

implementation of, legally binding agreements with homeless representatives—drafts of which must be reviewed and perhaps amended by HUD or DoD. BRAC Act § 2905(b)(7)(M)(i); 32 CFR § 176.45(d). Should any property revert to the LRA under the terms of one of those agreements, the LRA must attempt to secure use of the property by other homeless representatives to assist the homeless. BRAC Act § 2905(b)(7)(M)(ii); 32 CFR § 176.45(e).

4. The federal government's on-going decision-making for the future of the Reserve property, and the City's role as the federally-designated LRA.

The first phase of the base closure cycle at issue in this case—the federal decision to close a slate of bases including the Reserve—concluded in September 2005. See Gregoire v. Rumsfeld, 463 F.Supp.2d 1209 (W.D. Wash. 2006). DoD therefore must complete the current round of closures by September 2011. See BRAC Act § 2904(a)(5).

With respect to the Reserve, the second phase is progressing according to the detailed federal base closure law. As discussed above, DoD determined that the VA could make appropriate use of the new FLARC facilities in the northwest of the Reserve. R199, R207.

Having been selected as the LRA for the remainder of the Reserve property, the City fulfilled all three of its obligations under federal law.

See generally R175, R411, R446 (core LRA application documents).

First, following required procedures, the City identified interest in the Reserve property from providers of services to the homeless, and reached contingent agreements with qualified providers on proposals to use the base to meet the needs of local homeless populations. Second, based on extensive public outreach, the City prepared a redevelopment plan with such elements required by federal law as proposed public benefit transfers to the City for additional park land, a finance plan for how programs to support the homeless could be implemented, a conceptual development plan, and personal property that would support redevelopment. Because the important outreach efforts involved in these steps took a significant amount of time, the City requested, and DoD granted, a one-year extension for the City to submit its LRA application. R408-R409.

On September 18, 2008, the City Council passed a resolution formally approving the final act in the City's role as LRA: adopting an application and submitting it to HUD and DoD ("LRA Application"). See R320. The LRA Application consists of three documents required by federal law, each of which has various appendices: (1) a Redevelopment Plan, see R175; (2) a Homeless Assistance Plan, see R411; and (3) a document entitled "Public Involvement Process." See R446.

Having received the City's LRA Application, federal base closure law dictates that DoD, with HUD's assistance, now must review and possibly approve the Application as compliant with federal law, conduct environmental review of the Redevelopment Plan and a range of other alternatives under NEPA, and issue a ROD memorializing the federal government's decision on disposal and future use of the Reserve property. The statutory deadline for completing this and all other base closures remains September 2011.

C. Procedural history.

On October 13, 2008, MNPC initiated this suit in King County Superior Court to void the City resolution that adopted and authorized submission of the LRA Application. CP 3. MNPC ultimately proceeded under the Declaratory Judgment Act, RCW Chapter 7.24. CP 19. MNPC pled two grounds for relief: (1) that the City failed to conduct SEPA review of the LRA Application; and (2) that the application was inconsistent with the 1986 Park Plan. CP 8-9.

By stipulation, CP 19-26, the parties resolved this case through cross motions for summary judgment on the basis of an agreed record. See CP 27-136 (summary judgment briefing). In its cross motion, the City raised the affirmative defense that MNPC lacked standing to maintain this action. See CP 79-84, 95-97, 130-37.

On March 13, 2009, after entertaining oral argument, the trial court granted summary judgment to MNPC “in part”: (1) the court agreed with MNPC that the City needed to conduct SEPA review; and (2) although the court did not rule that the LRA Application was inconsistent with the 1986 Park Plan, the court ruled that the City faced a procedural duty to “publicly determine” the applicability of the Park Plan to the Application. CP 138 (minute entry); CP 158 (transcript of oral ruling); CP 189 (order on cross motions for summary judgment).⁵

The City timely moved for reconsideration, which the parties briefed. See CP 139-84. The trial court denied that motion. CP 187.

The City timely initiated this appeal of the orders on summary judgment and reconsideration. CP 185.

IV. SUMMARY OF THE ARGUMENT

MNPC lacks standing to maintain this action. Because only the federal government—not the City—has authority to dictate the future use of the Reserve property, MNPC’s claimed injuries depend on speculation about what the federal government might do. Furthermore, MNPC’s

⁵ In response to a motion from the Clerk of the Court of Appeals, the trial court clarified that its order on cross motions for summary judgment constituted an order of final judgment. See Joint Response To Clerk’s RAP 6.2(b) Reviewability Motion, App. A (on file with this Court).

interests are is outside the zone protected by SEPA and the 1986 Park Plan.

Even if MNPC had standing, its SEPA claim would fail because the City's adoption of the LRA Application is excluded from SEPA's definition of "action" and thus beyond SEPA's reach. SEPA excludes the adoption of any "policy or plan" for "the development of a series of connected actions...for which approval must be obtained from any federal agency prior to implementation." WAC 197-11-704(2)(b)(iii). This exclusion makes sense as a matter of efficiency and comity, is consistent with the fact that federal environmental review conducted pursuant to NEPA may satisfy SEPA's requirements, and avoids federal preemption of SEPA in this case. The trial court invoked a definition of "action"—one based on a decision to purchase land—that cannot stick to the LRA Application either factually or legally.

Finally, even if MNPC had standing, its 1986 Park Plan claim would fail because the LRA Application is consistent with that Plan, and the trial court lacked a foundation in law for its procedural requirement that the City must "publicly determine" the applicability of the Plan to the LRA Application.

V. ARGUMENT

When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences in the light most favorable to the nonmoving party. Miller v. Jacoby, 145 Wn.2d 65, 71, 33 P.3d 68 (2001). No inferences are necessary in this case because both parties moved for summary judgment and the facts and law lead to one conclusion: that MNPC lacks standing to pursue this action, and that MNPC's claims lack merit in any event. Because there are no genuine issues of material fact and the City is entitled to judgment as a matter of law, see CR 56(c), the City respectfully asks this Court to reverse the trial court and order entry of judgment for the City.

A. MNPC lacks standing to maintain this action.

"Inherent in the justiciability determination is the traditional limiting doctrine of standing." Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004).⁶ "If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it." High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). The burden is on the plaintiff to establish standing. Allan v. University of Washington, 92 Wn. App. 31,

⁶ The trial court's ruling on standing was premised on the mistaken belief that the City relied on federal standing law rather than Washington standing law. CP 166, lines 2-21.

35, 959 P.2d 1184 (1998). To do that, the plaintiff must establish at least: (1) injury in fact; and (2) that the interests the plaintiff seeks to protect are arguably within the zone of interests protected or regulated by the law allegedly violated. Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 828-29, 965 P.2d 636 (1998). MNPC fails to carry its burden of demonstrating compliance with either test.

1. MNPC's claimed injuries depend on speculation about what the federal government might do.

If a plaintiff alleges a threatened rather than an actual injury under the injury-in-fact test, she must show that the injury will be 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 the 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 should “not rely on their location alone,” but on “specific harms that will result from that proximity.” Id. 92. Wn. App. at 831.

MNPC is unable to allege specific harm from the LRA Application because the fate of the Reserve remains, as it always has, in the hands of

DoD, not the City. A fundamental premise to this dispute is that the City's authority to control the use of a military base is extremely limited. 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 activity. See, e.g., Middletown Twn'p v. U.S. Postal Service, 601 F.Supp. 125, 127-28 (D.C.N.J. 1985); Town of Groton v. Laird, 353 F.Supp. 344, 350 (D.C.Conn. 1972). 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 about the fate of the Reserve, the only role accorded the City is the one assigned by the BRAC Act. Without 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, DoD is blunt in reminding the public that DoD makes the call, not LRAs like the City: "While [DoD] will give deference to the redevelopment plan in preparing the record of decision or other decision documents, **it always retains ultimate responsibility and authority to make the final property disposal decisions.**" DoD Manual

at 28 ¶ C2.5.4 (emphasis added). In fact, DoD will make its own decision without any local input if the LRA fails to submit a timely 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.

Because DoD remains the ultimate decision-maker, only speculation can convert the LRA Application into concrete and specific harm sufficient to grant MNPC standing. MNPC can only guess whether DoD will follow the residential-heavy vision painted in the Application instead of the all-park vision favored by MNPC. Even if the LRA Application had suggested an all-park vision, MNPC could only speculate about whether DoD would ultimately implement that vision and not one with the housing to which MNPC objects. As the resolution adopting the LRA application reminds readers, implementation of the vision in the Application “depends on approval by HUD and the DOD, the results of environmental reviews and other processes....” R321.

MNPC added nothing to the record to firm up its conjectural claims of injury. To the contrary, MNPC employs language that betrays the speculative nature of those claims: that the City “**may** make changes” to the LRA Application if the City were ordered to conduct SEPA review, and that the Reserve “**likely** would be converted to park use” if planning

for the Reserve were to follow the 1986 Park Plan's provisions. CP 109 (emphasis added). Even where MNPC alleges how its members "will be" affected by the LRA Application (e.g., CP 5, 109), those allegations founder because future use of the Reserve property may look nothing like the vision spelled out in the Application. Compounding the speculation that the Application will dictate the fate of the Reserve, MNPC alleges that, had the City conducted SEPA review, the LRA Application itself "would be consistent with environmental protection" (CP 5-6, emphasis added)—an allegation at odds with the fact that SEPA is a procedural statute that would not mandate any particular substantive result. . See Moss v. City of Bellingham, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

Because MNPC could still get what it wants—a DoD-dictated use of the Reserve more to MNPC's liking—its allegations of injury remain speculative and unable to support MNPC's claim of standing to maintain this action.

2. MNPC's interests are outside the zone protected by SEPA and the 1986 Park Plan.

The zone-of-interests test is not a question of subject matter. It is not enough for a plaintiff to allege that a law deals with X, and that X interests and benefits her. Instead, she must show that the law she claims was violated was designed to protect her. Grant County Fire Protection

Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 803, 83 P.3d 419

(2004). MNPC cannot make that showing for either of the provisions it invokes here.

First, in support of its claim that SEPA was designed to protect MNPC's interests, MNPC alleges only that SEPA "requires that public hearings be held and that public input be received. [MNPC] is among those whose interests are required to be considered." CP 5. This allegation presupposes that the resolution MNPC challenges—the one MNPC wanted its interests to better influence—triggered SEPA. As described in more detail below, SEPA does not protect anyone where, as here, a city adopts a plan that must be approved by the federal government before it may be implemented. WAC 197-11-704(2)(b)(iii).

Second, MNPC cannot establish that the 1986 Park Plan was designed to protect MNPC's members. By their very terms, the 1986 Plan and the documents on which it is based constitute "a policy document, which should be used as a guide for making decisions," knowing that any such "long-range plan must be flexible and general." R073 (1986 Plan). Accord R002 (1972 Plan). By law, policy statements can create no enforceable rights or duties. See Judd v. American Tel. & Tel. Co., 152 Wn.2d 195, 203, 95 P.3d 337 (2004). If the City Council had wanted to adopt enforceable controls on the future use and development of

Discovery Park, the Council would have done so through ordinances, not the resolutions that adopted the 1974 and 1986 Plans. See City Charter Art. 4, § 14, Third and Sixth Amends. (“The City Council shall have power by ordinance and not otherwise...[t]o control the...property of the City [and] to regulate and control the use” of public places). See App. 6. The State Legislature has the power to make certain types of land use policy statements binding, and to provide a cause of action if a city takes certain actions inconsistent with those statements. See, e.g., RCW 36.70A.040, .070, .280 (Growth Management Act); RCW 90.58.080, .150 (Shoreline Management Act). But the 1986 Plan is not required by such a statute. It is the product of a laudable yet voluntary effort to provide policy guidance, not a cause of action. Because the 1986 Plan, by design, does not open the courthouse doors, MNPC is not within its “zone of interests” and MNPC lacks standing to maintain a claim based on the Plan.

The only interests relevant to MNPC’s concerns are interests in the zone protected by federal law. The BRAC Act mandated an extensive public process leading up to submittal of the LRA Application—a process in which MNPC and others debated the relevance of the guidance found in the 1986 Plan. R446-51 (summary of public involvement); CP 6 (MNPC “provided numerous comments” during that process). NEPA also requires

public input on, and review of the environmental impacts of, the proposal in the LRA Application plus a range of other reasonable alternatives. See DoD Manual at 99 ¶ C8.2.3.3. If, after DoD completes the Congressionally-mandated process and issues its decision about the fate of the Reserve, MNPC feels that its interests were not properly protected by this law, MNPC's recourse must be to a federal court to seek relief under federal law from the federal agency with the sole authority to dictate the future use of the Reserve.

B. Even if MNPC had standing, its SEPA claim would fail because the City's adoption of the LRA Application is excluded from SEPA's definition of "action."

Even if MNPC had standing to press its SEPA challenge, MNPC would face the burden of leaving this Court with the firm and definite conviction that the City had erred by not conducting SEPA review before submitting the LRA Application. See Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (describing the "clearly erroneous" standard of review under SEPA). MNPC cannot meet this burden because SEPA excludes the LRA Application from that law's reach.

1. **Adoption of the LRA Application was not an “action” within the meaning of SEPA.**

a) **Under SEPA, a plaintiff may challenge only an “action,” not a “proposal.”**

SEPA distinguishes “proposals” from “actions.” A “proposal” exists at the concept stage: when an agency “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. See App. 5.⁷ A proposal is nothing but a “*proposed* action.” Id. (emphasis added). An “action” does not exist until the agency actually makes a final, substantive decision on a proposal. RCW 43.21C.075(8); WAC 197-11-704(2). See App. 5.

This distinction is relevant under SEPA at two levels. First, an agency must perform SEPA review only for an “action,” not a “proposal”: “for any proposal which **meets the definition of action** and is not categorically exempt....” WAC 197-11-310(1) (emphasis added).

Second, SEPA authorizes a judicial appeal only of “actions” and not of “proposals.” SEPA’s appeal provision opens with this well-worn

⁷ “SEPA” as used in this brief includes both RCW Chapter 43.21C and the state and local rules that implement it. SEPA authorizes the Department of Ecology to develop SEPA rules, WAC Chapter 197-11, which courts must accord “substantial deference.” RCW 43.21C.095, .110. SEPA also authorizes local jurisdictions to adopt SEPA rules consistent with the state rules. RCW 43.21C.120(3), .135. In all respects relevant to this appeal, the City’s rules are virtually identical to the language of the Ecology rules, and the two sets of rules employ parallel section numbering. For the sake of simplicity, this brief will refer to the Ecology rules, even though the City’s rules arguably control this case most directly.

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).

b) SEPA excludes the adoption of the LRA Application from the definition of “action.”

Adoption of the LRA Application cannot be an “action” because it is expressly excluded from the definition of that term under SEPA. The opening clause of that definition **includes** “[t]he adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060)....” WAC 197-11-704(2)(b)(iii). This introductory clause embraces the LRA Application resolution. The Application includes a Redevelopment “Plan” and a Homeless Assistance Submission that describes itself as a “plan.” See, e.g., R416. The resolution adopting the Application casts the Plan as a statement of City “policy” regarding the reuse of the Reserve property. R321. The LRA Application addresses a series of connected potential actions including,

just to name a few: expanding a park, constructing market-rate and self-help housing, implementing a financing scheme to provide assistance to the homeless, altering site access and circulation, disposing federal personal property, and outlining governmental actions needed for implementation. See, e.g., R192-R193 (portion of Redevelopment Plan table of contents).⁸

But although the LRA Application fits the first clause of this definition of “action,” the Application also falls within that definition’s express **exclusion** of “any policy, plan, or program **for which approval must be obtained from any federal agency prior to implementation....**” WAC 197-11-704(2)(b)(iii) (emphasis added). This exclusion is tailor-made for the LRA Application because nothing in the Application will be implemented unless HUD approves the Application and DoD integrates the Application, in whole or in part, into its ROD after conducting NEPA review.⁹

⁸ The cross-reference in the definition of “action” to WAC 197-11-060 underscores that the LRA Application deals with a “series of connected actions” within the meaning of the definition. The referenced section provides that “proposals that are related to each other closely enough to be, in effect, a single course of action” must be considered together under SEPA 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). As required by federal law, the LRA Application brings together proposals on a range of interrelated disposal actions that HUD and DoD must consider and balance as a package.

⁹ This situation is analogous to one where courts rejected a SEPA challenge to a city proposal to fluoridate drinking water. Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 223, 151 P.3d 1079 (2007)**Error!**

This clear exclusion makes sense as a matter of comity and efficiency. Where a federal agency must approve a policy or plan, that agency must conduct environmental review under NEPA. SEPA recognizes this by excluding the submittal of such a plan or policy from the definition of “action” (ensuring that no duplicative SEPA review need occur) and authorizing the Washington agency to use the fruits of the NEPA review, supplemented as necessary, for any subsequent local action to implement the plan or policy. See RCW 43.21C.150 (where NEPA review has been conducted, that review may be used in lieu of SEPA review); WAC 197-11-610 (detailing the use of NEPA documents). This is exactly why the City, as the LRA for the Reserve closure, used the LRA Application to discuss scenarios for integrating future NEPA and SEPA review efficiently, depending on DoD’s approach and schedule. R299. Only delay and inefficiency would be served by MNPC’s attempt to redraft SEPA to require the City to engage in environmental review of all

Bookmark not defined. Because the city was powerless to act without State approval, the Court of Appeals rejected an argument that the city’s proposal was an action subject to SEPA:

[T]he superior court correctly observed that this “seems a bit like arguing that when a property owner signs a construction agreement with a contractor that action is itself subject to SEPA review.” That the City is an agency under SEPA rather than a private actor does not affect this analysis 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.

Id. (record cite omitted).

the actions that might be required to implement proposed activities that may or may not be approved by the federal government after it conducts its own environmental review, on property over which the City has no control, before the City could even submit a proposal to the federal government in the first instance.

c) The exclusion avoids federal preemption of SEPA in this case.

MNPC's misinterpretation of SEPA would set it on a collision course with the BRAC Act—a collision from which only the federal law would survive. “The doctrine of federal preemption is derived from the supremacy clause of the United States Constitution, article 6, section 2. Federal law preempts state law when Congress intends to occupy a given field, when state law directly conflicts with federal law, or when state law would hinder accomplishment of the full purposes and objectives of the federal law.” Berger v. Personal Prods. Inc., 115 Wn.2d 267, 270, 797 P.2d 1148 (1990). For purposes of preemption, federal regulations have the same effect as federal statutes. Id. There is a presumption against preemption unless the state law frustrates a clear and manifest purpose of the federal law. Wilson v. State, 142 Wn.2d 40, 46, 10 P.3d 1061 (2000).

Nearly identical rules bound claims that a federal law bars federal courts from entertaining a dispute involving federal law. Just like one

who urges federal preemption of state law, the person arguing that a federal court is precluded from reviewing a federal law dispute must overcome the “strong presumption” favoring judicial review with clear and convincing evidence of a contrary legislative intent. Bredesen v. Rumsfeld, 500 F.Supp.2d 752, 759 (M.D. Tenn. 2007); Gregoire, 463 F.Supp.2d at 1220. As in the preemption cases, Congressional intent in federal review cases may be derived from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. Blagojevich at 888-89; Gregoire at 1220-21; Corzine v. 2005 Defense Base Closure & Realignment Comm’n, 388 F.Supp.2d 446, 450 (D.N.J. 2005).

In federal cases dealing with a challenge to on-going federal efforts to implement the current round of base closures, federal courts from New Jersey to the Western District of Washington have overcome the strong presumption favoring judicial review and have refused to entertain the challenge. Bredesen at 758-62; Gregoire at 1220-23; Corzine at 450-51. These courts found that the text, structure, purpose, and history of the BRAC Act, including its narrow time limits, left no doubt that Congress intended to forestall judicial review. In doing so, these courts found persuasive the four-member concurring opinion in Dalton v. Specter, 511

U.S. 462, 479-484, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994).¹⁰ Among many other indicia of Congressional intent, the Dalton concurrence and the district courts noted how Congress treated NEPA:

The only instance in which [the BRAC Act] expressly provides for judicial review is in the limited context of objections as to [NEPA]. Further, such review is only available if initiated within a certain time period. This Court cannot articulate the implication of this express provision better than Justice Souter stated in his concurrence in Dalton:

This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.

Corzine at 450 (quoting Dalton 511 U.S. at 483). Accord Bredesen at 760; Gregoire at 1222. These federal courts also found significant the

¹⁰ Gregoire, 463 F.Supp.2d at 1221, explained the relevance of Dalton:

In Dalton, an action was brought under the Administrative Procedures Act (“APA”) seeking to enjoin the Secretary of Defense from closing a base pursuant to [the BRAC Act]. The Court decided the case on narrow grounds, holding that “the actions of the Secretary and the Commission cannot be reviewed under the APA because they are not ‘final agency actions.’” Id. at 476, 114 S.Ct. 1719. The Court further held that “[t]he actions of the President cannot be reviewed under the APA because the President is not an ‘agency’ under [APA].” Id. Justice Souter wrote a concurring opinion, in which three other justices joined, finding “[i]t [was] not necessary to reach the question ... of whether the [Commission’s] report is final agency action, because the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission’s or the Secretary’s compliance with it is precluded.” Id. at 479, 114 S.Ct. 1719. Justice Souter’s concurring opinion is persuasive: the express language, structure, objectives, legislative history and the nature of the agency action compel the conclusion that Congress intended to preclude judicial review of actions taken pursuant to [the BRAC Act].

fact that Congress had acquiesced in the Dalton concurrence by not responding to its clear conclusions. E.g., Bredesen at 761.¹¹

But for SEPA's express embrace of and deference to NEPA, the same reasoning would prompt Washington courts to conclude—despite the presumption against preemption—that Congress intended its comprehensive base closure scheme to preempt SEPA in a case like the one brought by MNPC. Congress has occupied the field of base closures

¹¹ A fourth federal district court—the Central District of Illinois—reached the same decision reached in Corzine, Bredesen, and Gregoire—that the reasoning in the Dalton concurrence explained why the BRAC Act precluded premature federal judicial review of challenges to base closures occurring under that Act. Blagojevich v. Gates, 558 F.Supp.2d 885, 888-91 (C.D. Ill. 2008). A three-member panel of the Seventh Circuit Court of Appeals recently affirmed Blagojevich, but in so doing asserted that the BRAC Act “does not limit recourse to the courts” for certain alleged violations. Quinn v. Gates, ___ F.3d ___, 2009 WL 2244142 at 3 (7th Cir., Jul 29, 2009).

In addition to being non-binding in this jurisdiction, where Gregoire continues to provide the most relevant federal authority, Quinn's reasoning is unpersuasive. Quinn asserts that the Dalton concurrence cannot be read for the proposition that the federal judiciary is precluded from reviewing premature challenges to BRAC Act closures, and that “the point of [the concurring] opinion was only that judges must not usurp the President's policy-making function and must respect the Act's all-or-nothing feature.” Id. The language of the Dalton concurrence belies this characterization and proves that the concurrence—as read by all four federal district courts that have considered the issue—stands for the proposition that the BRAC Act overcomes the strong presumption against preclusion of federal court review:

[T]he text, structure, and purpose of the Act compel the conclusion that **judicial review...is precluded**. There is, to be sure, a “strong presumption that Congress did not mean to prohibit all judicial review.” But although no one feature of the Act, taken alone, is enough to overcome that strong presumption, I believe that the combination present in this unusual legislative scheme suffices...

[The BRAC Act's structure] can be understood no other way than as **precluding judicial review** of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact.

Dalton 511 U.S. at 479, 483-84 (citation omitted; emphasis added).

and dictated that environmental review, and challenges to that review, must occur pursuant to NEPA and a unique set of deadlines. Congress's comprehensive scheme would be hindered by forcing the same review and similar challenges to occur pursuant to SEPA as a condition of a Washington-based LRA submitting the federally-required LRA Application. SEPA appeals alone—setting aside the time needed to conduct the initial SEPA review—can consume years.¹² Such delay is anathema to the intent manifest in the BRAC Act.

There is no need to find preemption in this case because SEPA expressly exempts the adoption of plans like the LRA Application from SEPA review and integrates NEPA into the SEPA structure. Preemption simply remains another reason to reject MNPC's mistaken belief that the City was required to conduct SEPA review before submitting the LRA Application.

¹² Examples of protracted SEPA appeals abound. See, e.g., Clallam County Citizens For Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 151 P.3d 1079 (2007) (four years from agency action to appellate decision); East County Reclamation Co. v. Bjornsen, 125 Wn. App. 432, 105 P.3d 94 (2005) (three years, seven months); Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) (two years, three months), Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 4 P.3d 115 (2000) (five years); Anderson v. Pierce County, 86 Wn. App. 290, 936 P.2d 432 (1997) (four years, ten months).

2. The definition of “action” invoked by the trial court cannot stick to the LRA Application.

MNPC argued that the LRA Application fit within a different SEPA definition of “action,” one that lacks the express exclusion for plans that must be approved by the federal government. MNPC stressed that, for purposes of SEPA, the LRA Application was not a plan governing a series of actions, but solely a decision to purchase land within the meaning of WAC 197-11-704(2)(a)(ii). See, e.g., CP 120-21. The trial court agreed with this characterization. “My ruling here, and this is a ruling as a matter of law, is that the City’s application here and the City’s resolution approving the detailed application here is clearly a project action to purchase, sale, lease, transfer or exchange natural resources including publicly owned [land].” CP 168, lines 19-25.

This ruling is incorrect on at least five levels. First, it ignores the fundamental fact that the City cannot decide to purchase property by resolution. The City may purchase property only through an ordinance, as it did when authorizing the acquisition of other property within Discovery Park from DoD. City Charter Art. 4, § 14, Fourth Amendment (“The City Council shall have power by ordinance and not otherwise...[t]o acquire by purchase...such lands and other property....as may be deemed necessary, proper or convenient for any corporate use....”). See App. 6. See also

Puget Sound Alumni of Kappa Sigma, Inc., v. City of Seattle, 70 Wn.2d 222, 227-28, 422 P.2d 799 (1967) (attempt to exercise legislative authority by resolution was unlawful where the Charter required an ordinance). Cf. R166, R344 (other-park purchase *ordinances*). By contrast, the City adopted the LRA Application by resolution—an action sufficient to express a present intent to purchase property should it be offered on certain terms, but not to manifest a “decision to purchase” within the meaning of SEPA.

Second, the trial court’s ruling cannot be squared with the fact that the City might not follow through on the intent reflected in the LRA Application. 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. The resolution adopting the Application anticipates those negotiations, and states an intent to engage the community in further discussions before agreeing to a total number of housing or homeless units beyond the figures spelled out in the Application. R321. If the federal government asks too much or imposes inappropriate conditions, the City may decline and DoD may transfer the Reserve property to others. See, 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). 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 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).

Third, the trial court’s ruling is internally inconsistent.

Immediately after stating that the LRA Application is a “decision” to purchase land within the meaning of SEPA, the trial court described the City as merely harboring an “intent” manifest in a “proposal”: “The City clearly has an **intent** here and it has never been shy about saying so, which is to acquire the [Reserve] and use it for residential development. This is a **proposal** to purchase natural resources....” CP 168-69 (emphasis added). As discussed above, if the LRA Application is a “proposal” manifesting an intent or a goal, it cannot yet be an “action” within the meaning of SEPA. Compare WAC 197-11-784 with RCW 43.21C.075(8) and WAC 197-11-704(2). See App. 5.

Fourth, even if the LRA Application were an “action” because it was a “decision” to purchase and sell land, it would be an action that is categorically exempt from SEPA review. See WAC 197-11-310(1) (“A threshold determination is required for any proposal which meets the definition of action and is not categorically exempt....”). SEPA

categorically exempts “[t]he purchase or acquisition of any right to real property....” WAC 197-11-800(5)(a). Courts have long recognized and applied this exemption. See, e.g., Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 421, 128 P.3d 588 (2006); Lassila v. City of Wenatchee, 89 Wn.2d 804, 815, 576 P.2d 54 (1978); Yakima County v. Evans, 135 Wn. App. 212, 220-22, 143 P.3d 891 (2006); Petition of Port of Grays Harbor, 30 Wn. App. 855, 865, 638 P.2d 633 (1982). SEPA also categorically exempts “[t]he sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to an authorized public use.” WAC 197-11-800(5)(b). To the extent the LRA Application envisions the City transferring any former Reserve property to others, it would be only after that land ceased to be subject to public use as a military base.

Finally, the trial court simply did not address the question of BRAC Act and NEPA preemption of SEPA in this instance. Requiring the City to conduct SEPA review—and then fight through years of appeals—as a condition to submitting the federally-mandated LRA Application would subvert clear Congressional intent to close bases expeditiously. Fortunately, SEPA precludes a finding of federal preemption by excluding adoption of plans like the LRA Application from SEPA’s definition of “action.” Unfortunately, the trial court charted a

collision course for Washington and federal law without even acknowledging the consequences.

- C. Even if MNPC had standing, its 1986 Park Plan claim would fail because the LRA Application is consistent with that Plan and no procedural requirement to discuss the Plan exists.**

Neither MNPC nor the trial court identified a standard of review applicable to an allegation that a city resolution—let alone a resolution authorizing submittal of a federally-required proposal—violates a different city resolution adopting a policy guide for future use of a city park. No standard of review exists because policy statements like the 1986 Park Plan create no enforceable duties. That point is explored above in greater detail in the context of MNPC lacking standing for being outside the zone of interests protected by the 1986 Plan.

Undeterred by a lack of standing or the dearth of an enforceable right or a standard of review, MNPC pressed its claim that the LRA Application must be voided because it calls for non-park uses in the Reserve property which, according to MNPC, the 1986 Park Plan designated for park use. CP 9, lines 7-10 (MNPC's Petition). The trial court side-stepped this substantive claim and adopted a procedural basis for voiding the LRA Application. CP 190, lines 18-19 (Order). Neither

MNPC's substantive argument nor the trial court's procedural rationale holds water.

1. The LRA Application is consistent with the 1986 Park Plan.

As discussed above, the 1986 Park Plan is a policy guide adopted by resolution, not an enforceable right adopted by ordinance. The remedy for those who believe that the City is departing from the 1986 Plan's guidance is political, not judicial. MNPC may not morph the 1986 Plan into something it is not: a binding, enforceable law.

But even if the LRA Application could be challenged as a legal matter for alleged inconsistency with the 1986 Park Plan, no factual support for that challenge could be found. The LRA Application is substantively consistent with the 1986 Plan in at least four key respects that merit discussion. First, the 1986 Plan deemed "essential" the acquisition of two pieces of military property, R098-099, which the City has acquired. R166; R344. Consistent with the fact that the Plan continues to show most of the Reserve property as the only "Army Retained Area," see App. 4, the LRA Application acknowledges continued federal authority to dictate future use of that property.

Second, the 1974 Plan long-range map (left intact by the 1986 Plan) shows the northwest segment of the Reserve property as "Army

Property Requested for Park Use.” See App. 4. The LRA Application indeed requests all of that land (at least all that DoD is not retaining for VA use) for park use. R288-R291.

Third, the 1974 and 1986 Plans call for the main park entry, or “East Gate,” to be on the park’s eastern boundary, just south of the Reserve Property. See App. 4 (1974 Plan); R083 (1986 Plan, calling this entry a “fundamental element” of the Plan). The LRA Application would preserve this main entry, improvement of which was a “guiding principle” for the Application. R259.

Finally, the 1986 Plan calls for working with nearby residents to improve the safety and suitability of this “gateway.” R101. Consistent with that call, the City Council, when adopting the LRA Application, expressed its intent that, “as future planning proceeds for the redevelopment of the [Reserve], the City will examine and discuss with the community issues concerning the intersection” at the main entry. R321.

The principal inconsistency alleged by MNPC is the LRA Application’s call for non-park uses in an area supposedly designated by the 1986 Plan for park use. CP 9. This allegation springs from a fundamental misunderstanding of planning for the park and the land surrounding it. As detailed in the Statement of the Case, the 1972 Plan’s

call for converting all of the Reserve property into a park and constructing a grand mall entrance through it was expressly rejected by the adopted 1974 Plan (which slates most of the Reserve for non-park uses), and would now directly conflict with subsequent preservation of Kiwanis Ravine for heron habitat and retention of the FLARC building and its adjacent parking area for use as a VA clinic.

2. The trial court's "public determination" requirement lacks a foundation in law.

The trial court agreed that the 1986 Park Plan provides no substantive remedy: "I think the remedies will be political and not legal." CP 173, lines 5-6. But the trial court added that, before pursuing that substantive remedy in the political arena, MNPC could invoke a procedural remedy in court. The trial court concluded that "[t]he City must at least explain why it's not considering the Master Plan." CP 172, lines 18-19. The court therefore voided the LRA Application resolution until "the City publicly determines whether the [1986] Plan applies to the [Reserve] property and, if not, why not." CP 190.

No support for this "public determination" requirement exists. Neither the 1986 Plan nor the resolution adopting it contains such a requirement. See R073. MNPC cited no authority for a "public determination" requirement. The trial court simply invoked a variant of

the mountaineer's classic, because-it's-there rationale: "[T]here must be a reference to the Plan when one deals with any of this nonpark uses within the park **because that's what the Plan is for: it is for everything that happens within the park.**" CP 171, lines 10-14 (emphasis added).

Through this logic, one could spin procedural requirements from a host of municipal resolutions; even resolutions that provide no substantive rights enforceable in court would now open the courthouse doors to claims that that a city failed to publicly discuss those resolutions when treading into territory addressed by them. Municipalities should be free to memorialize laudable policy guidance in resolutions—and to run the risk of political retribution for not following that guidance—without automatically creating procedural, "public determination" duties enforceable in court.

Highlighting the nebulous foundation for the trial court's "public determination" requirement are unanswered questions about how the City must comply with that requirement. Must the determination be written? If so, must it be memorialized in a resolution adopted by the Council, or would a report from the Mayor suffice? If a written determination is not required, would it be sufficient to provide evidence of the Council having acted after discussing, and apparently resolving, the issue of the LRA Application's consistency with the 1986 Park Plan? Like the trial court's

“public determination” requirement itself, the means of complying with that requirement should not be spun from whole cloth.

VI. CONCLUSION

The fate of the Reserve remains in the hands of DoD, whose actions—and the supporting roles of HUD and the City—are dictated by a comprehensive statutory scheme that Congress specifically designed to close bases expeditiously and without midstream litigation. MNPC lacks standing to pursue this case because MNPC can only speculate about what DoD will do, and because MNPC’s interests in this base closure are outside the zone protected by SEPA and the 1986 Park Plan. Even if MNPC had standing, its claims would lack merit because SEPA expressly excludes the adoption of the LRA Application from the definition of “action,” and because the 1986 Park Plan is consistent with the LRA Application and imposes no procedural duties on the City.

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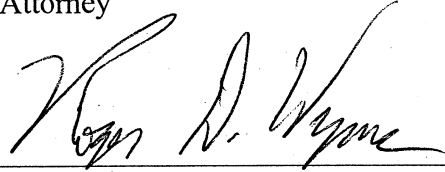
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The City therefore respectfully asks this Court to reverse the trial court and to order that judgment be entered for the City.

Respectfully submitted August 13, 2009.

THOMAS A. CARR
Seattle City Attorney

By:

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

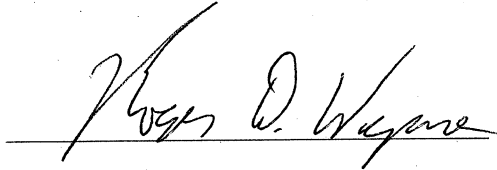
CERTIFICATE OF SERVICE

I certify that, on this date, I caused a copy of the City's Opening

Brief to be placed in the U.S. Mail, postage prepaid, to:

Elizabeth Campbell
Magnolia Neighborhood Planning Council
3826 - 24th Ave. W.
Seattle, WA 98199
*Representative of Respondent Magnolia Neighborhood Planning
Council*

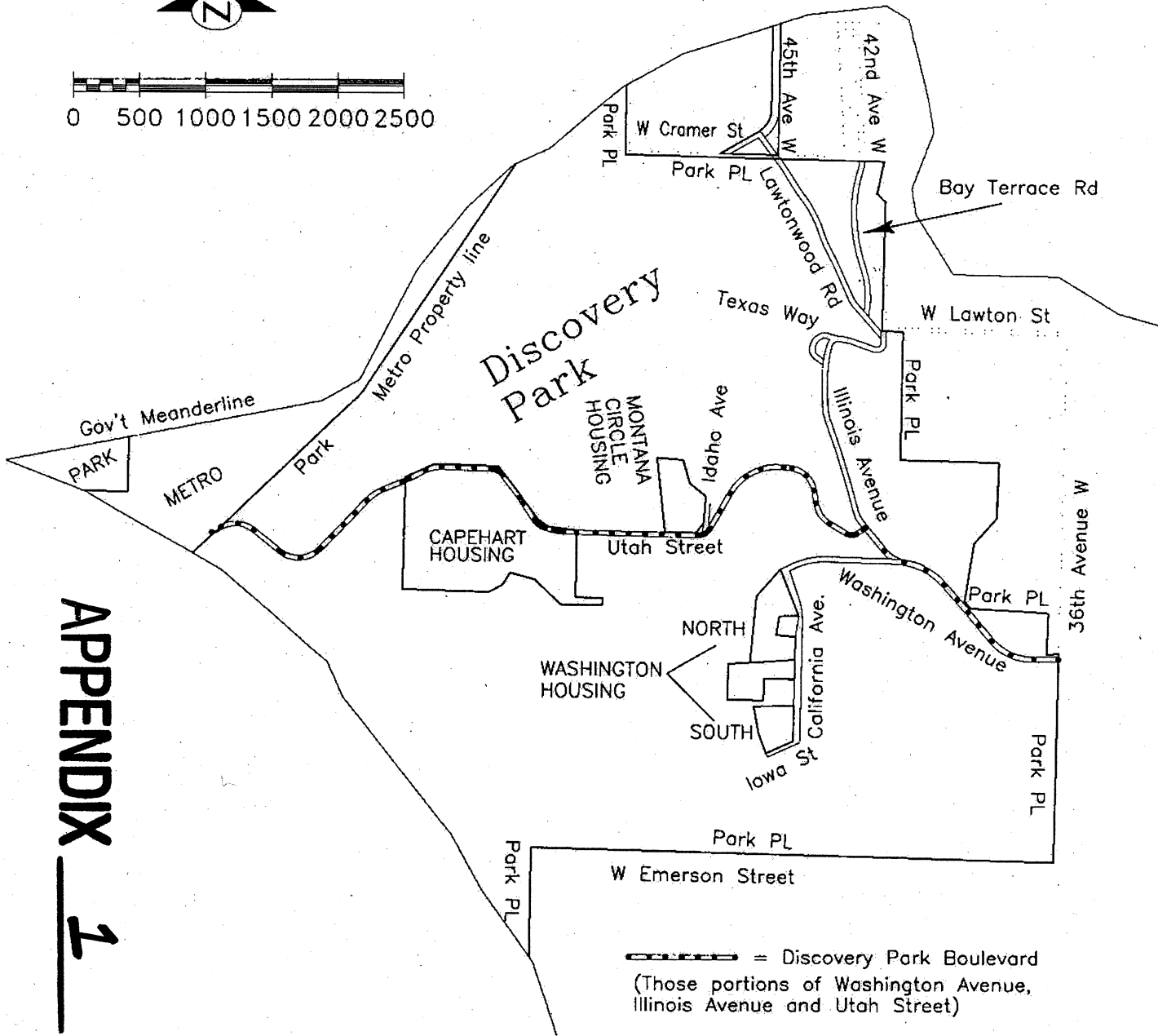
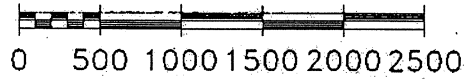
DATED August 13, 2009.

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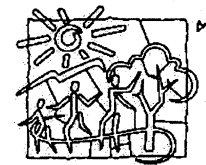
ROGER D. WYNNE
Assistant City Attorney
Attorney for Appellant City of Seattle

Attachment A

Discovery Park Boulevards



APPENDIX 1



SEATTLE PARKS
AND RECREATION

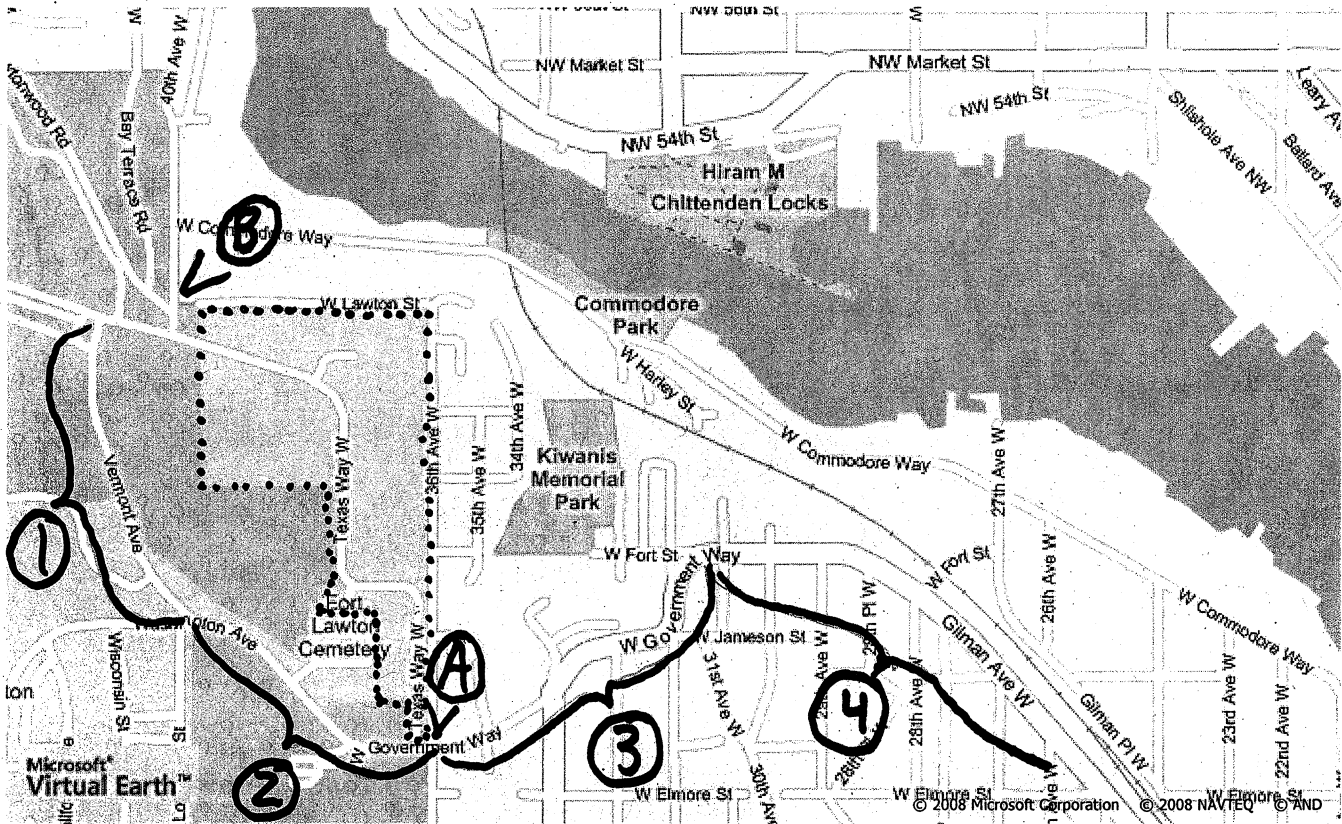
Attachment A
to
Discovery Park Boulevards Ordinance

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Greg Nickels, Mayor

SEARCH: Go

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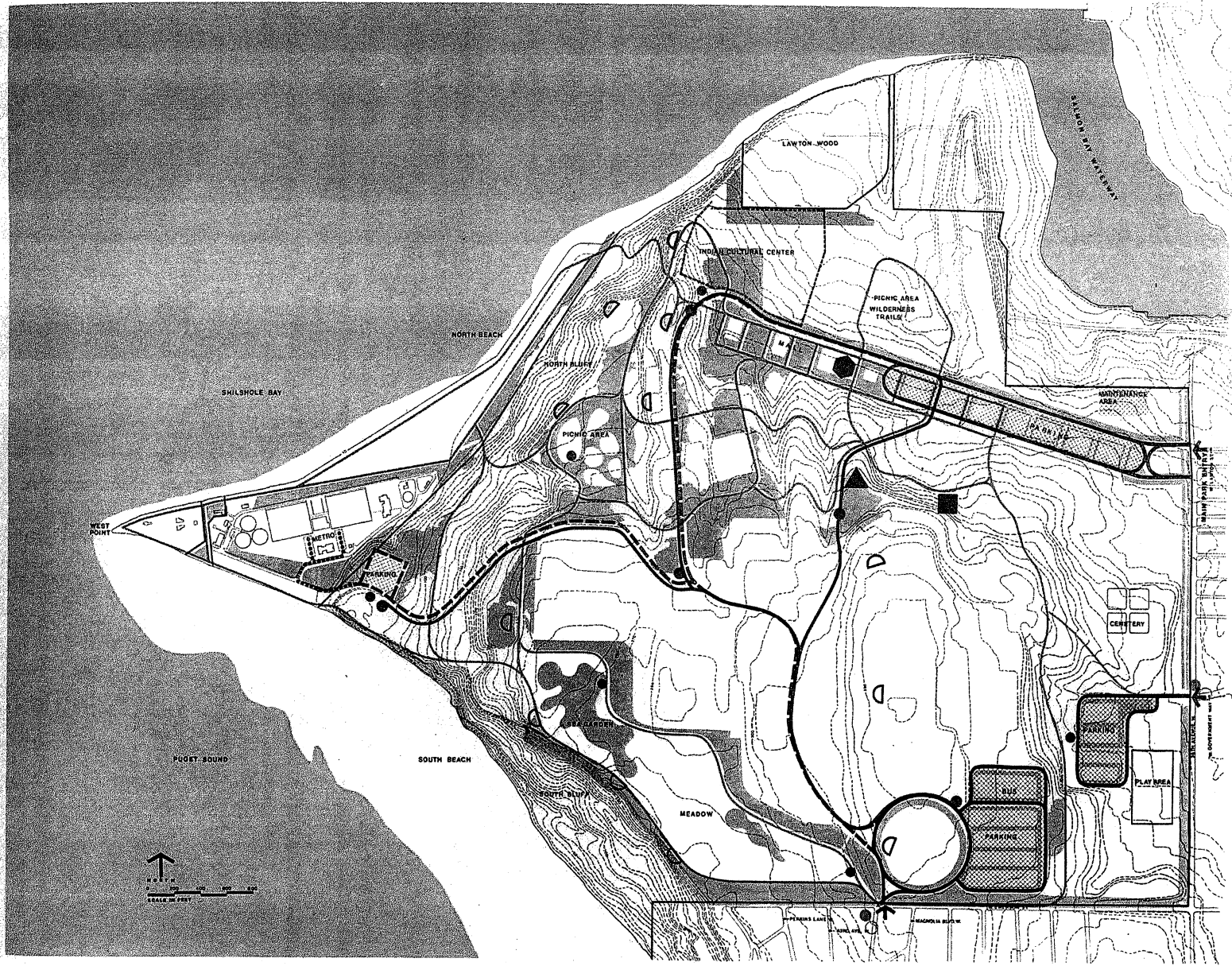


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This is an illustrative exhibit compiling other information from the record. This exhibit uses R327 as its base and has been marked up by the City's counsel using a dotted line to approximate the boundary of the Army Reserve property (see R241) and the following key for the other markings:

1. Illinois Avenue. See R376 (App. 1 to this brief; Ordinance 122503, "Attachment A: Discovery Park Boulevards" (2007)). The base map above incorrectly shows this as "Vermont Ave."
2. Washington Avenue. *Id.* The base map above incorrectly suggests that Washington Avenue does not extend to the eastern boundary of the Park (at "A" above).
3. West Government Way. The base map above incorrectly suggests that this extends into the Park. See *id.*
4. Gilman Avenue West. See R327.
- A. The "Main Park Entry" to Discovery Park, as shown on the 1974 Plan map. See R051 (App. 4 to this brief).
- B. The "Secondary Park Entrance" to Discovery Park at W. Lawton St., as shown on the 1974 Plan map. See R051 (App. 4 to this brief).
























APPENDIX 3 (1972)



MASTER PLAN

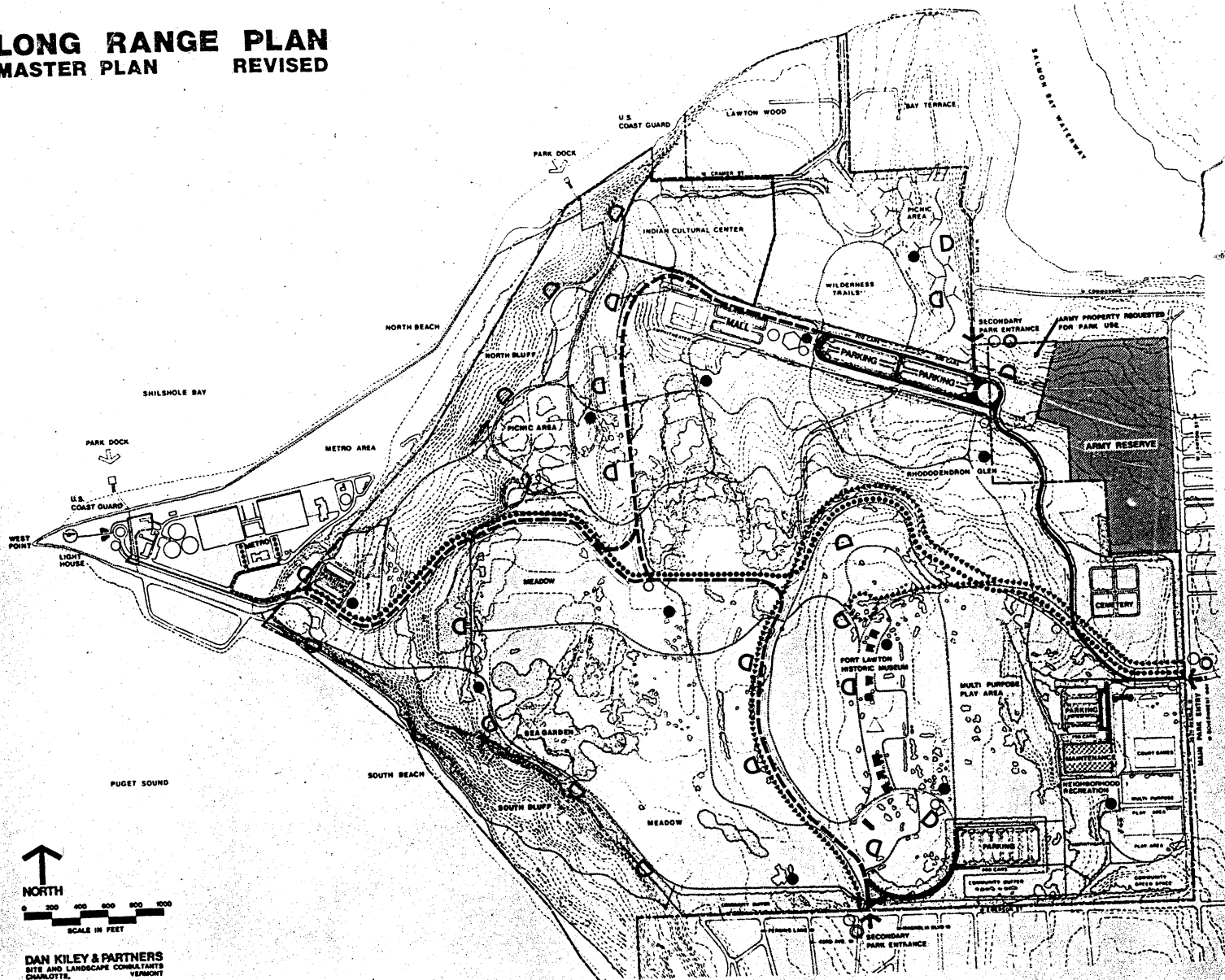
LONG RANGE

LEGEND

	FORT LAWTON BOUNDARIES		MINI-BUS ROUTE AND STOP
	INDIAN CULTURAL CENTER		OVERLOOK
	MAINTENANCE AREA		NATURE INTERPRETIVE AREA
	PARKING AREA		RHODODENDRON GLEN
	COMFORT STATION		ORIENTATION CENTER
	METRO ACCESS ROAD		PLAY AREA
	VEHICLE ACCESS WEEK DAY		EXISTING TREE COVER
	VEHICLE ACCESS WEEK END		NEW PLANTING
	EXISTING CONTOURS AT 10-FOOT VERTICAL INTERVALS		TIDELAND
	VEHICLE ENTRY		PUGET SOUND
	BICYCLE ENTRY		
	PEDESTRIAN ENTRY		
	PATHS		

**LONG RANGE PLAN
MASTER PLAN REVISED**
















APPENDIX 4 (1974)



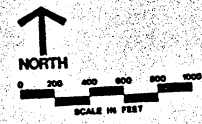
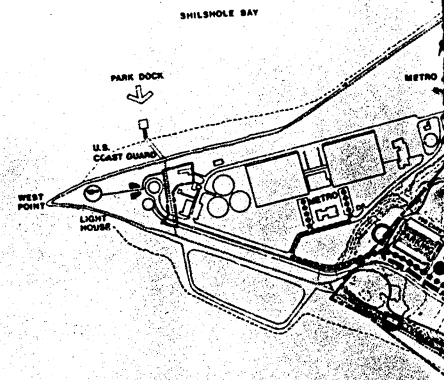
DAN KILEY & PARTNERS
SITE AND LANDSCAPE CONSULTANTS
CHARLOTTE, VERMONT

FEBRUARY 1, 1974

LEGEND

- DISCOVERY PARK BOUNDARIES
- INDIAN CULTURAL CENTER
-  MAINTENANCE AREA
-  PARKING AREA
-  COMFORT STATION
- METRO ACCESS ROAD
- VEHICLE ACCESS WEEK DAY
- VEHICLE ACCESS WEEK END
- - - EXISTING CONTOURS AT 10 ft. VERTICAL INTERVALS
-  VEHICLE ENTRY
-  BICYCLE ENTRY
-  PEDESTRIAN ENTRY
-  PATHS
-  MINI-BUS ROUTE AND STOP
-  OVERLOOK
-  WATER ACCESS
-  ARMY RETAINED AREA
-  ORIENTATION AND NATURE INTERPRETIVE CENTER
-  WEATHER OBSERVATORY
-  EXISTING TREE COVER
-  NEW PLANTING
- ◀◀◀◀ SCENIC LOOPS

**LONG RANGE PLAN
MASTER PLAN REVISED**



DAN KILEY & PARTNERS
SITE AND LANDSCAPE CONSULTANTS
CHARLOTTE, VERMONT
FEBRUARY 1, 1976

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APPENDIX 5

**Relevant provisions of SEPA and Washington State Department
of Ecology SEPA regulations, with emphasis added.**

RCW 43.21C.075 (bold and underline added)

(1) 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**. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) **Appeals** under this chapter **shall be of the governmental action** together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be **commenced within the time required to appeal the governmental action** which is subject to environmental review.

...

(8) For purposes of this section and RCW 43.21C.080, the words “**action**”, “decision”, and “determination” **mean substantive agency action** including any accompanying procedural determinations under this chapter (except where the word “action” means “appeal” in RCW 43.21C.080(2)). The word “action” in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The word “determination” includes any environmental document required by this chapter and state or local implementing rules. The word “agency” refers to any state or local unit of government. Except as provided in subsection (5) of this section, the word “appeal” refers to administrative, legislative, or judicial appeals.

WAC 197-11-704 (*italics in original*; bold added):

(1) “Actions” include, *as further specified below*:

(a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;

(b) New or revised agency rules, regulations, plans, policies, or procedures; and

(c) Legislative proposals.

(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:

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.

(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**;....

WAC 197-11-784 (bold added):

“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.

APPENDIX 6

Select provisions of the City of Seattle Charter, Article IV, Section 14, all dealing with powers that the City Council may exercise “by ordinance and not otherwise,” with emphasis added.

POWERS BY ORDINANCE: The City Council shall have power **by ordinance and not otherwise** –

....

Third. CONTROL OF FINANCES AND PROPERTY: **To control the finances and property** of the City; Provided, that the City Council shall have no administrative as distinguished from the legislative power.

Fourth. ACQUISITION AND DISPOSAL OF PROPERTY: **To acquire by purchase** or by exercise of the right of eminent domain or otherwise and for the use and in the name of the City, such **lands and other property** within or without the corporate limits as may be deemed necessary, proper or convenient for any corporate use, and to acquire for the use of the City any property by gift, bequest or devise, and to dispose of all such property as it shall have, as the interests of the City may from time to time require.

....

Sixth. ESTABLISH, IMPROVE, CONTROL AND VACATE STREETS AND PUBLIC PLACES; CERTAIN STREETS AND LANDS TO PASS TO OR VEST IN PORT OF SEATTLE: To lay out and improve streets and other **public places**, and to **regulate and control the use thereof**, to authorize or prohibit the location of any railroad or public transportation system or the use of electricity, at, in or upon any of said streets or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof; to vacate streets and to extend, establish or widen any street, over or across or along the harbor, shore or tide lands in the City; Provided, that whenever there shall have been adopted by the voters a comprehensive plan of harbor or port improvement, the control of streets and the title to any lands belonging to the City within the limits of such proposed improvement shall be vested in the Port of Seattle, after said Port has commenced the improvement and has so certified to the City Council.

....

Thirteenth. POLICE POWER: To make all such local, police, sanitary and other **regulations** as are not in conflict with the laws of the state.

....

Sixteenth. EXECUTION OF VESTED POWERS: To make all **rules and regulations** necessary or proper to carry into execution all powers vested by this Charter, or by law, in the City or in any department or officer thereof, except as in this Charter otherwise provided.

....

Section 15. GENERAL LEGISLATIVE POWERS: The City shall, in addition to the powers enumerated in this Charter, have all other **powers now or hereafter granted to or exercised by municipal corporations** of like character and degree, and also all powers now or hereafter granted to incorporated towns and cities, by the laws of this state, and may exercise the same by ordinance and not otherwise.

....

Section 21. ORDINANCES CREATING DEBT: No **debt or obligation** of any kind against the City shall be created by the City Council except by ordinance specifying the amount and object of such expenditure.

....