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BEFORE THE CITY COUNCIL
OF THE CITY OF SEATTLE

In the Matter of the Application of	)	No. CF 308884
	)	
SEATTLE CHILDREN'S HOSPITAL	)	
	)	DIRECTOR'S REPLY TO LCC'S
For approval of a Major Institution Master Plan	)	RESPONSE TO DIRECTOR'S APPEAL
	)	

I. INTRODUCTION

In its response to the appeal filed by Seattle Children's Hospital ("Children's") and the Director, Laurelhurst Community Club ("LCC") directs most of its argument against Children's, intentionally demeaning the other parties by labeling them as "surrogates" for Children's. The Department of Planning and Development ("DPD") is sometimes identified by LCC as a "surrogate," sometimes not, even though it should be clear from the Director's Appeal that its interests in this matter are governmental. LCC's response brief is remarkable, not just for the level of vitriol expressed, but for the level of obfuscation of the record and the issues that confront Council. In this reply the Director will address those issues that impact the correct and orderly interpretation and administration of SMC Chapter 23.69, the City's Major Institution Code.

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II. ARGUMENT

A. The Significant Adverse Impacts of Children's Expansion Are Mitigated and a Smaller Alternative Is Not Warranted.

LCC's main theme throughout its response is excoriation of Children's for not presenting alternatives with less development area. Both LCC and the Hearing Examiner seem to forget that LCC specifically raised the issue that no alternatives with less development area than 2.4 million square feet were considered in its SEPA appeal, but the Examiner dismissed that issue in her "Order on LCC's Motion to Remand and Children's Motion to Dismiss and Limit Discovery," dated February 27, 2009. The Examiner stated there that "...to the extent that on-site alternatives with less development square footage and height fail to feasibly attain or approximate Children's objective, they are not reasonable and the Director was not required to consider them in the EIS." Children's went on in the hearing on the proposed MIMP to demonstrate the need for the number of beds that would be housed in that development area. The Director's focus in her recommendation, and the CAC in theirs, was to mitigate the significant adverse impacts from fulfilling that need, rather than to decide how many beds for sick children should not be provided. The Examiner left the proof of need and all the proposed mitigation out of her balancing equation.

B. The Hearing Examiner's Recommendation Is Not Entitled to Deference.

The Land Use Code nowhere assigns deference to a Hearing Examiner's recommendation to the City Council on a proposed Major Institution Master Plan (MIMP). A recommendation is not a final decision entitled to deference on appeal. Although LCC is correct to laud the experience and expertise of the Examiner, it forgets that the Council, not the Examiner, is the final decision

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maker on Type IV land use decisions, including Major Institution Master Plan applications.[1] In situations where the Examiner's decision constitutes a recommendation only, as in this case, the Council may substitute its judgment for that of the Examiner on all issues.[2]

LCC misconstrues the burden of an appellant –any appellant[3] - on a Type 4 decision and cites no authority for its claims regarding the Examiner's role. Contrary to LCC's unfounded assertion that "the appellant must affirmatively demonstrate that the Hearing Examiner's recommendation is not supported by substantial evidence,"[4] SMC 23.76.056 provides that the Council's decision must be *based on applicable law* and *supported by substantial evidence* in the record established by the Examiner, whether the recommendation is appealed or not. (emphasis added). Although Council's decision must be based on the record compiled by the Examiner for the Council, nothing in the Code mandates Council to follow the Examiner's recommendation. Further, in making its decision on a Type IV land use decision, Council is required to make its own findings of facts,[5] indicating again that it is the decision-making body, not an appellate body reviewing a final decision.

Here, Council should substitute its judgment for that of the Examiner and, based on the record established before the Examiner, make the final decision on Children's MIMP. That final decision should be to approve, rather than deny, the MIMP.

C. The Hearing Examiner's Reliance on Urban Village Policies Is Legal Error.

In its response, LCC attempts to re-characterize the Examiner's reliance on the Urban Village policies as merely setting out the "context" in which Children's needs and the

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[1] SMC 23.76.056 and SMC 23.69.032.J.
[2] *Maranatha Min., Inc. v. Pierce County*, 59 Wn.App. 795, 800, 801 P.2d 985 (1990)(citing *Rosales v. Department of Labor & Indus.*, 40 Wn.App. 712, 715, 700 P.2d 748 (1985); *West Slope Comm'ty Council v. Tacoma*, 18 Wn.App. 328, 337-38, 569 P.2d 1183 (1977).
[3] LCC seems to forget it bears the same burden on its appeal of some the Hearing Examiner's proposed conditions.
[4] LCC's Response, at p. 5.
[5] SMC 23.76.056.B.

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surrounding community's needs are balanced.[6] It is crystal clear, however, that the Examiner's recommendation to deny the proposed Master plan is, for the most part, based upon her reliance on the Comprehensive Plan's Urban Village policies.[7] It is equally clear that the policies included in the Comprehensive Plan are not to be used in making decision on individual permit applications. As stated in the Comprehensive Plan: "The Plan will *not be used* to review applications for specific development projects *except when reference to this Comprehensive Plan is expressly required* by an applicable development regulation." (emphasis added).[8] The only reference to the Comprehensive Plan in the Major Institution Code (SMC Chapter 23.69) requires the Director to include an assessment in her report regarding the extent to which the Major Institution will address the goals and applicable policies under the Education and Employability and Health in the Human Development Element. The Comprehensive Plan is a planning tool, a tool used to guide how areas of the City will be zoned in the future but not something used in making a decision on a permit.[9]

LCC's extended discussion of the Urban Village policies is simply a diversionary tactic to obscure the law and confuse the City Council. The controlling case law agrees with the statement in the Comp Plan quoted above: *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 873-74, 947 P.2d 1208 (1997) states "A county's comprehensive plan is generally to be used as a 'guide' or 'blueprint,' and as such, it is not usually appropriate to use it to make specific land use decisions." See also, *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007)(comprehensive plan does not directly regulate site-specific land use decisions);

[6] LCC's Response, at pp. 11 and 13.
[7] Examiner Recommendation, Conclusions 39-46, at p. 29.
[8] Comp. Plan, at p. *xi.*
[9] Reader's Guide to Comp. Plan, at p. 7.

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Barrie v. Kitsap County, 93 Wn.2d 843, 613 P.2d 1148 (1980)(strict adherence to a comprehensive plan has not been required).

Children's location outside of an urban village is not grounds for denial or conditioning of its Major Institution Master Plan. A Council decision on a proposed MIMP is governed by Chapter 23.69, which clearly lays out both the process to be used in reviewing an application for a Major Institution Master Plan, and the criteria to be use in the decision-making process. Neither Children's, the CAC, nor DPD has ever treated Children's Major Institution designation as a "blanket entitlement for development to whatever the institution demands regardless of context."[10] The Major Institutions Code is specific on the factors to be considered, and those factors have nothing to do with urban villages.

Similarly, LCC's attempt to tie urban villages into the rezone discussion[11] is yet another attempt to obscure the issues facing the City Council and draw attention away from the rezone criteria for major institutions that the Director correctly determined that Children's had met, and substitute instead the general rezone criteria. An example is LCC's citation to UV 39 and the general rezone criterion SMC 23.34.008.E.4, which LCC cites for the proposition that heights higher than 40 feet should be limited to urban villages, implying without any foundation that the section, which permits higher heights for major institutions outside of urban villages when consistent with a "a major institution's *adopted* master plan" means that the master plan has to be one that already exists. But the policy and the code section do *not* say "*existing* master plan," and LCC's erroneous interpretation is belied by the rezone criteria specific to Major Institution Overlay (MIO) districts set forth in SMC 23.34.124.C. That section contains no reference to urban villages, no reference to location relative to urban villages, no reference to whatever

[10] LCC's Response, at p. 12.
[11] LCC's Response, at pp. 14-17.

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heights have been approved for other major institutions, and no limits on heights to 40 feet. What is more, it specifically provides that its criteria are to be used in selecting appropriate heights for *proposed additions to existing MIO districts* (emphasis added), and that compatibility of heights is to be addressed at the district boundaries. Even if there were a conflict between the general rezone criteria and those specific to major institutions, LCC's argument ignores the familiar rule of statutory construction that when a general statutory provision and a specific one both apply, the specific provision supersedes the general one.[12] But there is no conflict, because when the proposed MIMP is approved, its heights will be consistent with an adopted master plan, as contemplated by SMC 23.34.008.E.4.

D. LCC Misstates the Height Impacts in the Boundary Transition Areas.

From reading LCC's Response,[13] the City Council would be left with the impression that there are numerous differences between the Hearing Examiner's recommendation, DPD's recommendation, and Children's Master Plan proposal on height transitions along 40th Avenue NE and NE 45th Street. One would also be left with the mistaken belief that numerous impacts would result to single family home residents as a result of the proposal. In fact that is not the case. There are only three differences, and only the third recommendation has any relationship to single family homes:

1. The location where you measure the line dividing the 125 and 140 foot height limits proposed for the Laurelon Terrace property.
2. The upper level setbacks along 40th Avenue NE and Sand Point Way.
3. The south setback along NE 45th Street.

[12] *Waste Management of Seattle, Inc. v. Utilities and Transportation Com'n.*, 123 Wn.2d 621, 869 P.2d 1034 (1994).
[13] LCC's Response, at pp. 18-24.

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In the first case, Children's has proposed to limit heights to 125 and 140 feet. The CAC's and DPD's recommendation, accepted and adopted by Children's, is that the dividing line be measured as an east/west line lying 350 feet north of the current south property line of the Children's campus. The map that accompanied the CAC recommendation was prepared by Steve Sheppard, staff to the CAC from the Office of Neighborhoods, and prepared after the CAC meeting at which the recommendation was voted on. The map used a line that LCC argued was 400 feet from the south property line, rather than 350 feet as described in the language of the recommendation. The Hearing Examiner's acceptance of LCC's argument was error. There is nothing in the record to support the 400 foot distance, other than the map, and no discussion in the record as to what specific impacts would be reduced by moving the line 50 feet farther north, other than the LCC wants the dividing line to be as far back as possible.

Children's agreed to the CAC and DPD recommendation requiring a MIO 50 along the west side of the campus. From 45th Street to Sand Point Way, the depth of the MIO will be 80 feet, as measured from the property line. Along Sand Point Way to the intersection of NE 50th Street, the depth of the MIO will be 30 feet as measured from the property line. The Hearing Examiner recommended that the Master Plan be amended to include the 80 feet and 30 feet depth as upper level setbacks for portions of buildings higher than 50 feet. The end result is exactly the same in terms of limits on building heights - the only difference is whether the height limit of 50 feet is called a MIO 50.

The third case is the south setback along NE 45th Street between the intersection of 40th Avenue NE and the existing Children's campus boundary. NE 45th Street is a collector arterial of approximately 40 feet in width, with parking along the south side of the street. There are 5 Laurelon Terrace condominium buildings along this southern edge, with two buildings situated

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parallel to NE 45th Street. The setbacks from the street for these two buildings appear to be approximately 10 to 15 feet from the sidewalk and planting strip, or 20 to 25 feet from the street edge. On the south side of NE 45th Street, there are six single family homes that face onto NE 45th Street, with setbacks of varying distances, the closest of which appears to be approximately 25 feet back from the sidewalk and planting strip, or approximately 35 feet from the street edge. A seventh single family home is oriented facing 42nd Avenue NE, with NE 45th Street abutting its "side yard". Combined, the width of the street and the existing setbacks of the single family homes, provide an approximately 75 feet of separation from the street edge of the L-3 property, and an approximately 85 to 90 foot separation from the existing Laurelon Terrace buildings.

Children's proposed a MIO 37 feet overlain with 40-foot landscaped setback measured from the south property line, and then a MIO 50 of approximately 80 feet in depth measured from the east/west northern boundary of the setback. Combined with the street width and single-family setbacks, this would effectively result in an approximately 115 feet of separation between the single family homes on the south side of NE 45th Street and the proposed Children's garage to be located on the southwest corner of the expanded site.

DPD and the CAC both found the proposed landscaped setback of 40 feet, coupled with the additional 80 foot depth of MIO 50, as providing an adequate transition in height, but requested that the Master Plan be clarified to expressly prohibit above-ground structures within the setback areas. Children's accepted this clarification. The Hearing Examiner recommended that the landscape setback be increased to 75 feet. There is nothing in the record, other than LCC's testimony requesting the change, that supports the increase nor presents any evidence as to what impacts would be eliminated or reduced through the increased setback.

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E. The Council Should Accept the DPD and CAC Recommendations on MIO Heights.

With the exception of where to measure the dividing line between the 125 and 140 foot height limits on the Laurelon Terrace property, and the recommendation increasing the setback along NE 45th Street, in her alternative recommendation the Examiner accepted the proposed height limits recommended by the CAC, and did not recommend further conditioning on heights. LCC attempts to mislead the Council as to what the Hearing Examiner found, or even what has been made part of the record.

LCC alleges that Children's statement that the proposed new buildings would be lower than its existing buildings, when measured from an elevation standpoint, is based only on a comparison with a "pop-up" (LCC's word) on the G Wing. LCC ignores Figure 39 of the Master Plan which clearly shows the elevations of existing and proposed buildings and their spatial relations to each other. Figure 39 shows the top of the existing Melinda French Gates building at Elevation 202', the G Wing at Elevation 218', and the top of the proposed bed units to be located on the Laurelon Terrace site ranging from Elevation 167 to Elevation 182.

LCC also would have the Council ignore the relationship of SEPA to the Major Institution Code. SEPA requires an analysis of height, bulk and scale with surrounding development. However, the height criteria applicable to Major Institutions, located in SMC 23.34.124.C.2, specify how height impacts are dealt with: "Height limits at the district boundary shall be compatible with those in the adjacent areas." DPD correctly analyzed the compatibility of heights at the district boundaries and imposed conditions to ensure appropriate transitions in heights from the residential neighborhoods located across the surrounding streets. The proposed MIO-37 around the entire south, east and north boundaries and the MIO-50 for portions of the

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west boundary that are not designated as MIO-37 provide the needed transition and height compatibility.

In enacting the Major Institution section of the Land Use Code, the City Council clearly envisioned that the heights of major institutions would exceed the heights of single-family and multi-family structures, by as much as 210 feet in some cases. In SMC 23.69.004 Major Institution Overlay District, there are nine height districts established, and not a single one of the MIOs are as low as the height of a single family residence. That section provides that "all land within the Major Institution Overlay (MIO) District shall be designated with one (1) of the following height limits as shown on the Official Land Use Map, Chapter 23.32: MIO-37 37 feet, MIO-50 50 feet, MIO-65 65 feet, MIO-70 70 feet, MIO-90 90 feet, MIO-105 105 feet, MIO-160 160 feet, MIO-200 200 feet, and MIO-240 240 feet."

As they did at pp. 15-17 of the Response, LCC goes on to repeat[14] their circular and erroneous argument that height limits greater than 40 feet for major institutions outside of urban villages may only be considered if they are consistent with a previously adopted master plan. Obviously, the heights in the proposed new master plan are inconsistent with the existing master plan. But neither the Major Institutions Code nor the MIO District rezoning criteria contemplate that an existing MIMP can never be altered or replaced. If Children's proposed MIMP is approved, the proposed heights will be consistent with an adopted Major Institution Master Plan, as required by SMC 23.34.008.E.4.

F. The Hearing Examiner's Confusion Over FAR Limits Requires Correction.

The underlying zoning of Children's campus is single-family and multi-family, in which zones there are no floor area ratio (FAR) limits. Both zones limit development through heights

[14] LCC's Response, at p. 28.

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and setbacks. This approach is reflected in the existing MIMP for Children's - there are only limits on heights, setbacks and overall square footage; no limits or mention of FAR.

The Major Institutions Code requires only that the Development Component of a proposed MIMP include: "Density as defined by total maximum developable gross floor area for the MIO District and an overall floor area ratio (FAR) for the MIO District."[15] Since the Code does not prescribe what the FAR for the MIO District should be, nor provide that any type of development should be excluded from FAR, DPD's interpretation is that both may be prescribed by the decision on the MIMP.[16]

In preparing the subject Master Plan, Children's proposed a total development of 2.4 million gross square feet, excluding parking, and this amount was recommended by both the DPD Director in her recommendation and in the CAC's recommendation. The Hearing Examiner, in her condition number 1, agreed and stated: "Children's shall limit total development on the expanded campus to a total of 2.4 million gross square feet, excluding parking."

In doing the FAR calculation, Children's only excluded parking, as parking was not included in the 2.4 million gross square feet of proposed development. At the hearing, Children's stated it was seeking a FAR of 1.9 to include both above and below grade square footage, but excluding parking and mechanical.

The CAC, in their review of the Master Plan, did their own calculation of FAR using the method used for downtown zones based on "chargeable floor area."[17] For their calculation, they excluded parking, building space located below ground (estimated at 20% of the total gross

[15] SMC 23.69.030.E.2.
[16] Hearing Examiner's Recommendation, Finding of Fact 59, at p. 11.
[17] Exhibit 8, CAC Final Report and Recommendation, at p. 201.

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square feet), and mechanical. Their calculation resulted in a FAR of 1.5. Children's has agreed to the CAC recommendation of 1.5 FAR, excluding parking, building space below ground, and mechanical.

In the Hearing Examiner's Conclusion number 17, she summarized by stating "FAR should exclude only mechanical equipment, any parts of structures below grade, and below-grade parking." The Hearing Examiner in her recommended conditions, number 2, stated "The Floor Area Ratio (FAR) for the expanded campus shall not exceed 1.9, excluding below-grade parking and rooftop mechanical equipment." The problem with this is that the FAR calculation of 1.9 is based on 2.4 million square feet divided by total lot area. The 2.4 million gross square feet number includes both above and below building space and mechanical space, and excludes all parking, whether it is above or below grade. To exclude only rooftop mechanical and below-grade parking from the FAR calculation, one would have to start with a different number than 2.4 million square feet (since that includes mechanical and excludes all parking), which would result in a different FAR number.

Contrary to LCC's assertion on page 35, the Hearing Examiner does not appear to understand the difference between the overall square footage proposed for the MIMP and the FAR, and has only added confusion to the subject. To eliminate any continuing confusion on this subject, the Director recommends that the City Council adopt the CAC recommendation of a FAR of 1.5, excluding parking, building space located below grade, and mechanical.

G. LCC Misrepresents the Record on Transportation Impacts.

LCC's analogy[18] of the fate of Washington Mutual to the traffic modeling studies done by DPD's transportation consultant is incomprehensible. All traffic engineers use mathematical

[18] LCC's Response, at p. 35.

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models, including the engineer employed by LCC to testify at the hearing on the adequacy of the EIS, although he failed to persuade the Examiner that the traffic impact analysis was inadequate. Indeed, LCC's entire argument misstates the record and conveniently ignores the facts established in the SEPA appeal. For instance, the discussion of the additional minute in travel time in the westbound direction between Children's and I-5[19] neglects to mention that the additional minute is based on the *unmitigated* future year forecast, as is stated on page D-92 of the FEIS. (emphasis added). Mitigation is expected to result in a 30-40% decrease in PM peak hour traffic volumes, with a resulting decrease in additional travel times on this and other corridors.[20] There is no citation to the record for the unsupported claim that there will be "16 hours of additional delay.[21] Another instance of mischaracterizing the record is the statement that "DPD and Children's are dismissive of such delays"[22]; LCC overlooks the efforts made by both Children's and the City to develop effective and appropriate mitigation for these corridor impacts.[23]

LCC implies that delays from other projects, including 520 and University Village expansion, were not taken into account in the traffic mitigation, but this is not the case.[24] Delays from other potential development are included as part of the No Build (2012) alternative, as stated in the EIS and at the appeal hearing.[25] The reference to results from the "University District subarea plan" should be ignored, because no such document is in the record. Further, the reference to T-4 table 8 in the FEIS makes no sense – table 8 is a listing of intersection analyses

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[19] LCC's Response, at p. 36.
[20] FEIS, D-92.
[21] *Id.*
[22] *Id.*
[23] Exhibit 9,Director's Analysis and Recommendation, at pp.70-73, 78.
[24] LCC's Response, at p. 37.
[25] Page D-38 of the FEIS: "Forecasts of the baseline traffic volumes for the 2030 horizon year were developed to account for increases in traffic due to new development in the study area and regional traffic growth."

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(levels of service) for year 2030 No-Build and Build Alternatives for the PM peak hour, not corridor levels of service or any other corridor information.[26]

LCC's insistence that the Montlake – NE 45th – Sandpoint Way corridor is a local neighborhood street system borders on the absurd. The record is clear that between 0 – 5% of the Children's-generated traffic would be on "local streets". [27] Of course residents of Laurelhurst use the corridor to get to the neighborhood, but it is misleading to state that the traffic generated by Children's expansion will be on the local street system; given that this corridor, the primary route to Children's, is State Route 513. The Montlake – NE 45th – Sandpoint Way corridor is appropriately characterized as a regional street system in the EIS.[28]

III. CONCLUSION

For the reasons stated above, the Recommendation of the Hearing Examiner to deny the proposed MIMP should be rejected and the Director's Recommendation, as modified, should be accepted and the MIMP approved.

DATED this 28th day of September, 2009.

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By: Judith B. Barbour
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[26] LCC's Response, at p. 37.
[27] Exhibit 6, Appendix d, Figures 18 and 19.
[28] E.g., FEIS, p. 3.10-5- 3.10-7.

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SEATTLE CHILDREN'S HOSPITAL	)	
	)	CERTIFICATE OF SERVICE
for approval of a Major Institution Master Plan.	)	
	)	
	)	

I certify that on the 28th day of September, 2009, I sent copies of the following documents:

1. **Director's Reply to LCC's Response to Director's Appeal;** and
2. **Certificate of Service**

to the following parties by e-mail address listed below for that party:

1. Seattle Community Council Federation at rickbarrett@gmail.com
2. Dixie & Steve Wilson; Laurelon Terrace at pbuck@bucklawgroup.com
3. Seattle Displacement Coalition; Interfaith Taskforce on Homelessness at jvf4119@zipcon.net
4. Catherine Hennings at cjhennings@gmail.com
5. Seattle Children's Hospital at johnkeegan@dwt.com
6. Coalition of Major Institutions at walst@foster.com

and to the following parties by first class mail, by depositing the copies in the U.S. mail by 5:00 p.m., with proper postage affixed, at the post office address listed below.

1. Seattle Community Council Federation
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2. Dixie & Steve Wilson
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9. Hawthorne Hills Community Council
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10. Laurelhurst Community Club
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of September, 2009, at Seattle, Washington.

Rosie Lee Hailey

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