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No. 73409-1-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

KINDERACE, LLC,
a Washington limited liability corporation,

Appellant,

v.

CITY OF SAMMAMISH,
a Washington municipal corporation,

Respondent.

On Appeal from the Superior Court of the
State of Washington for King County
No. 13-2-23271-5 SEA

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APPELLANT'S REPLY BRIEF

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INTRODUCTION

This regulatory taking case is based on denial of "all economically viable use" of a discrete and separate legal parcel. The question comes down to determining "what parcel" is the one to be considered for takings analysis purposes.

Kinderace, LLC, argues that the relevant parcel for takings analysis is Parcel 9032, as it currently exists. This is with the lot lines as reconfigured as a result of a boundary line adjustment (BLA) that was approved in 2008. Kinderace applied for a Reasonable Use Exception for this parcel which was denied, thereby triggering the claim for compensation for a regulatory taking of the current Parcel 9032.

The City of Sammamish contends that whether there has been a denial of all economically viable use should be measured against the old Parcel 9032, as it existed prior to the 2008 boundary line adjustment. The City points out that prior to the boundary line adjustment, old Parcel 9032 included the land area north of George Davis Creek. That area (north of the creek) was used for constructing a storm water detention facility to handle the runoff from the development project on the adjoining Parcel 9058. That parcel was being developed with a KFC/Taco Bell and a day care facility and it needed a storm water detention facility. Because Parcel 9058 provided

substantial economic use, and the project included the area north of the creek that was formerly included within Parcel 9032, the City argues there can be no taking of the current Parcel 9032.

The City and trial court err in failing to recognize the legal significance of the approval of the BLA. Specifically, approval of the BLA creates a discrete and legal lot that includes all the normal rights of use and development as any other legally created lot. As will be shown, this conclusion is not only required by *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003) (boundary line adjustment results in "a legally created lot"), and *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993) (a "fundamental attribute" of property includes the "right to make *some* economically viable use") but, in addition, the City's own code is express that a BLA must result in a parcel that qualifies as a "building site." If the current Parcel 9032 did not qualify as a separate and discrete building site, the BLA could not have been approved. Sammamish Municipal Code (SMC) 19A.24.020 (4) (b). Morever, under *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), once the City approved the BLA and there was no timely judicial challenge, the doctrine of finality is triggered and the BLA is considered valid and cannot be collaterally attacked. The City's attempt to undo the approved BLA, and pretend that it does not exist, must be rejected

under Washington law. Accordingly, the relevant parcel for analyzing the regulatory taking must be Parcel 9032, as it exists after approval of the BLA. This is the parcel for which the Reasonable Use Exception was sought, and denied, and which is therefore rendered economically useless. When focused on Parcel 9032 as it currently exists, the City cannot dispute that all economically viable use is denied. A regulatory taking should be found.

CORRECTIONS TO THE CITY'S MISSTATEMENT OF FACTS

Throughout the City's version of the statement of facts, it very loosely refers to "the parcel" or "Parcel 9032" without being clear whether it is referring to Parcel 9032 in its configuration prior to the 2008 boundary line adjustment, or its configuration after the BLA. For example, the City states at the top of page 2 of its Brief of Respondent that "the entirety of Parcel 9032 has been previously developed by Mr. Severson." The City does not identify whether it is referring to Parcel 9032 as it existed prior to the BLA, or after the BLA. Of course, the area south of George Davis Creek has never been developed. It remains vacant today. This is the area that comprises Parcel 9032 after the BLA approval. So, the City's assertion that "the entirety" of Parcel 9032 was previously developed is patently false. The area that was previously developed is limited to the area north of the creek. That area was part of the old Parcel 9032, prior to the BLA. A correct statement

of fact is this: Parcel 9032 as it existed prior to the BLA included the area north of George Davis Creek, and that area was developed with a storm water detention pond. In contrast, Parcel 9032 as it exists after the BLA approval is completely vacant and has never been developed. Despite using some misleading language or loose statements that might give a different impression, the City does not dispute these facts.

ARGUMENT

I

THE CITY'S APPROVAL OF THE BLA CREATED A DISCRETE, LEGAL, AND BUILDABLE LOT

The division of land in Washington is governed by RCW Chapter 58.17. That chapter sets forth the procedures and requirements for dividing land through the formal platting process. But not all divisions of land are required to be reviewed and approved through a plat. For example, the law also allows divisions of land through a binding site plan. RCW 58.17.035. Similarly, the detailed and complex platting procedures are inapplicable to nine other types of divisions that are identified in RCW 58.17.040. One of those is a division accomplished through a boundary line adjustment. RCW 58.17.040 (6). The provision states:

> The provisions of this chapter shall not apply to: . . .

> (6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does **not create any additional** lot, tract, parcel, site, or division which contains insufficient area and dimension to **meet minimum requirements for** width and area for **a building site**.

Id. (emphasis added).

Under this statute, a division of land through a boundary line adjustment must meet two criteria. First, the adjustment must not create any "additional" lots. In other words, if you start with three lots, you must end with three lots. The lots can be very different, completely reconfigured, be given new names or reference numbers, and be unrecognizable from the prior lots. But the overall number of lots cannot increase.

The second requirement is that the newly configured lots must all have sufficient area and dimension to meet minimum requirements for a "building site." In other words, a boundary adjustment cannot result in a substandard lot. As held in *Mason v. King County*, 134 Wn. App. 806, 142 P.3d 637 (2006):

> RCW 58.17.040 (6) does not permit a local jurisdiction to approve a BLA application that would transform a legally created lot into a substandard, undersized lot.

Id. at 808-09.

The City suggests that a BLA is for making "minor" changes to lot boundaries. While some BLAs are for minor changes, divisions made

through a BLA can also be substantial. *Island County v. Dillingham Development Co.*, 99 Wn.2d 215, 662 P.2d 32 (1983), allowed the boundary line adjustment procedure to make substantial changes to an old plat. *Id.* at 223. Using a BLA, several hundred old platted lots were completely reconfigured and combined to make 87 entirely new lots that met the current minimum dimension and zoning. *Id.* at 217. In *City of Seattle v. Crispin*, this authority for substantial re-division of lot lines was confirmed.

> Despite the sizeable changes to the plat, we held that the adjustments in *Dillingham* fell under the exemption set forth in RCW 58.17.040(6). . . . [A]s we recognized in *Dillingham*, the statute does not support the distinction the Court of Appeals draws between adjustments that are minor compared with substantial. Nor would such a rule be workable, and would perhaps be unconstitutional.

Crispin, 149 Wn.2d at 904-05. *Crispin* abrogated a prior decision, *R/L Associates, Inc. v. Klockars*, 52 Wn. App. 726, 763 P.2d 1244 (1988), which held that a BLA was intended to only apply to minor boundary changes. *Crispin*, 149 Wn.2d at 904 ("*Klockars* directly conflicts with our holding in *Dillingham*.").

In short, boundary lines can be reconfigured in creative and substantial ways, provided that "additional" lots are not created, and the reconfigured lots retain sufficient area to qualify as a "building site."

A. New Lots Are Created by the BLA Process

The City argues that a BLA does not create a new lot, but merely provides new lot lines for the old lot. The City is incorrect.

First, the fact that there are new lot lines and new dimensions necessarily means that legally, the resulting lot is a new legal lot that did not previously exist. Indeed, the new lot was "created by" the BLA. With any BLA, there are old lots, and there are new lots.[1] Sometimes, the old and new lots may not look too much different, and other times they are substantially reconfigured and unrecognizable. In all situations, the physical dimensions are new, the legal descriptions are new, and there will be new deeds transferring the land to match the reconfigured boundary lines. From a legal perspective, these are new lots that did not previously exist. They result from a new "division" of property accomplished through the BLA process.

The language in the statute and cases recognize that these lots are "created" by the approved BLA. For example, RCW 58.17.040 (6) provides the exemption from the platting requirements for

---

[1] This is demonstrated in *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). In that case, as with many BLA applications, the parcels were referred to as "Old Parcel A", "Old Parcel B" and "Old Parcel C." After the BLA, the parcels were referred to as "New Parcel A", "New Parcel B," and "New Parcel C." *Id.* at 909. Likewise, the legal descriptions of the new parcels were different because the lots were different. *Id.*

> "A **division** made for the purpose of adjusting boundary lines, . . . which does not **create** any additional lot, . . . nor **create** any lot . . . which contains insufficient area . . . for a building site."

Id. (emphasis added). By using the term "create," the statute is recognizing that the legal affect of the BLA division is to create lots. The limitation is that the newly created lots must not increase in number (no additional lots) and the newly created lots must meet minimum requirements to qualify as a building site.

Case law uses similar language. Most clear is *Crispin*, where the legality of Tax Lot 164 was challenged. The Washington Supreme Court recognized "the 1972 [BLA] adjustment **which created** lot 164" did not produce any additional lots and therefore met the requirements of the statute. *Crispin*, 149 Wn.2d at 904-05 (emphasis added). The Court concluded that "Tax lot 164 is a **legally created** lot with the statutory exemption under RCW 58.17.040 (6)." *Id.* at 905 (emphasis added). As subsequently stated by this Court in *Mason*:

> The Court ruled in favor of Crispin, finding that **his lot was legally created by a BLA** that was exempt from the requirement of RCW 58.17 because the property division did not create additional lots.

Mason, 134 Wn. App. at 811 (emphasis added).

In *Mason*, this Court again recognized that the resulting lot from a BLA is a "new lot."

> Mason cogently urges that the county must look to its applicable minimum lot size when determining whether a **new lot** following a BLA qualifies as a "building site."

Id. at 812. Similarly, in *Dillingham*, our Supreme Court recognized that through a BLA, a "total of 118 lots were created." *Dillingham*, 99 Wn.2d at 216.

In the same fashion, when the City of Sammamish approved the BLA between old lots 9032 and 9058, those old lots did not continue to exist. Instead, new lots were created with different dimensions, and different legal descriptions, and new deeds to reflect the new parcels.

B. Normal Rights of Use and Development Attach to the New Lots Created by an Approved BLA

In many instances, such as Parcel 9058, the resulting new lot is already developed. But in other instances, the resulting new lot, such as Parcel 9032, is vacant and available for development. However, the BLA cannot be approved if such a vacant lot is not qualified as a building site.

In 2008, Kinderace applied to the City for a boundary line adjustment between Parcels 9032 and the adjacent 9058. In approving the boundary line adjustment, the City had to make two determinations. As set forth above, the City had to first determine that no "additional" lots were created. This is

clearly satisfied. The boundary line adjustment began with two lots and ended with two lots. There were no "additional" lots created.

The second criteria required the City to determine if the BLA would result in lots that meet minimum requirements for a "building site." This Washington statutory requirement is also present in the Sammamish City Code. SMC Chapter 19A.24 sets forth the City's approval process for BLAs. The code provides:

> Adjustment of boundary lines between adjacent lots shall be consistent with the following review procedures and limitations:
>
> . . .
>
> (4) A boundary line adjustment proposal shall not: (a) Result in the creation of an additional lot; (b) Result in a lot that does not qualify as a **building site** pursuant to this title

SMC 19A.24.020 (4) (emphasis added).

The term "building site" is not defined in the state statute, but it is defined in the Sammamish Code. The term "Building site" means an area of land

> capable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions.

SMC 19A.04.060. Significantly, the City, *in approving the BLA*, necessarily

determined that the proposed new Parcel 9032 would qualify as a building site. If it was not capable of being developed as a building site, the BLA could not have been approved.

The decision in *Mason v. King County* is particularly instructive. In that case, Parker owned two adjacent lots, zoned A-10 (Agriculture with 10-acre minimum lot size). Parker applied for a BLA that resulted in one of the lots being only 7.54 acres. *Mason*, 134 Wn. App at 809. King County approved the BLA and the neighbor timely filed a Land Use Petition challenging the approval. On appeal, the Division I panel noted that "Chapter 58.17 RCW does not contain a definition of 'building site.'" *Id.* at 811. Accordingly, the Court looked to the local definition.

> . . . Mason cogently urges that the county must look to its applicable minimum lot size requirements when determining whether a new lot following a BLA qualifies as a "building site" pursuant to RCW 58.17.040 (6). Because RCW 58.17.040 (6) provides only that a lot resulting from a BLA may not contain "insufficient area and dimension to meet minimum requirements for width and area for a building site," **local governments are free to define the dimensions of a "building site"** so long as that definition is consistent with applicable zoning requirements.

Mason, 134 Wn. App. at 812 (emphasis added).

Not surprisingly, the Sammamish Municipal Code mirrors the King County Code that was applied in *Mason*. As here, the King County Code " . . . prohibits approval of a BLA that would 'result in a lot that does not

qualify as a building site . . .'" *Mason*, 134 Wn App. at 812 (citing King County Code 19A.28.020 (C)(2)). In *Mason*, because the lot created by the BLA did not meet the minimum lot size requirement, it was an illegal BLA. *Id*.

In the present case, Sammamish approved the BLA. That decision was not challenged and is now final. In order to approve the BLA, the City necessarily determined that the resulting new Parcel 9032 qualified as a "building site." And of course, if the Reasonable Use Exception had been granted, there would be no lawsuit now and the project would be underway. The City's contention that development rights do not attach to a lot created through a division via boundary line adjustment is contrary to state law, and contrary to the express language of the City's own code.

As set forth in Kinderace's Opening Brief, every legally created lot has a fundamental right to some economic use. As a legal lot, current Parcel 9032 carries all the fundamental attributes of property ownership. In addition to the right to possess, the right to exclude others, and the right to dispose of property, another fundamental attribute of ownership is the right to make some economically beneficial use.

> In light of *Lucas*, another "fundamental attribute of property" appears to be the right to make *some* economically viable use of the property.

Guimont v. Clarke, 121 Wn.2d at 602 (italics by the Court). In short, the approval of the BLA created a new legal lot that carries with it the right to some economically viable use. The City's contention that the new legal lot resulting from the BLA approval does not have a right of use is wrong and must be rejected.

C. Public Policy Supports Kinderace

The Washington Supreme Court has made it clear that BLA decisions are land use decisions that are entitled to finality unless timely challenged under LUPA. *Nykreim*, 146 Wn.2d at 926. In *Nykreim*, the Court underscored the "strong public policy supporting administrative finality in land use decisions." *Nykreim*, 146 Wn.2d at 931. Moreover, "land use decisions from this court emphasize the need for property owners to rely on an agency's determinations with reasonable certainty." *Id.* at 933.

Here, Kinderace relied on the finality of the BLA and expended more than $100,000 on the first attempt to develop the Ace Hardware project. The City balked at that proposal, and Kinderace responded by scaling back to the proposed pizza restaurant.

If the BLA did not qualify as a building site, then it never should have been approved. But the BLA was approved, the City determined it did qualify as a building site, and Kinderace was properly able to rely on that

approval and pursue development of Parcel 9032. The application submitted by Kinderace seeking a reasonable use exception, and thereby seeking to exercise the fundamental right of some economically viable use, necessarily relied on the certainty that Parcel 9032 was a legal lot. By taking away that right, the trial court undermines the public policy of finality and reliance by property owners on the BLA approval.

II

PARCEL 9032 HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE AND THEREFORE A REGULATORY TAKING HAS OCCURRED

In *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990), the Court stated the law clearly:

> [I]f the landowner succeeds in showing that a regulation denies all economically viable use of **any parcel** of regulated property, then a constitutional taking has occurred.

Id. at 335 (emphasis added). That is precisely what Kinderace has shown. The regulated parcel is 9032. The City does not dispute that with denial of the Reasonable Use Exception, only 83 square feet of the parcel is allowed to be developed. Of course, such a small area is not capable of any viable economic use, and the City does not contend otherwise.

In response, the City mischaracterizes the takings claim as being based on enactment of the 2006 critical area regulations. That is incorrect.

The taking is based on the denial of the Reasonable Use Exception for the pizza restaurant, which was submitted in July, 2013, and denied in November, 2013.

The City also contends that there is no taking because Parcel 9032 has had economic use as the location for the storm water pond that was part of the development with the adjoining Parcel 9058. Of course, that position begs the question. As explained above, the pond is located only in the area north of George Davis Creek. After 2008, that area is no longer part of Parcel 9032, and that area was not part of the 2013 application for a reasonable use exception. In short, the City's response to the taking claim seeks to pretend that the 2008 approval of a BLA does not exist. But the BLA does exist. It was approved. Government and landowners must rely on such approvals. And by denial of the RUE, the City has closed the door on any economically viable use of this discrete and legal lot. That is a taking for which the constitution guarantees a right of compensation. Of course, the City could have avoided the constitutional problem by simply granting the RUE. But the City chose a different path, and now the Court should find a regulatory taking of Parcel 9032.

III

ATTORNEYS FEES SHOULD BE AWARDED TO KINDERACE, BUT NOT TO THE CITY

The City is not eligible for attorney fees under RCW 4.84.370 because that statute does not apply here. That statute permits parties to recover attorney fees only when a land use approval or decision is upheld on its merits in two different courts. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 78, 340 P.3d 191 (2014). As the City points out, Kinderace has not argued on appeal that the RUE should have been approved. Rather, Kinderace on appeal has maintained that it has a right to compensation for the taking of its land. RCW 4.84.370 does not apply to the constitutional takings issue. *Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005).

The City is also wrong that Kinderace's claim for attorneys fees should be denied. Contrary to the City's argument, *Sintra v. City of Seattle* supports Kinderace's request for attorney fees. 131 Wn.2d 640, 935 P.2d 555 (1997). RCW 8.25.075 (2) provides for attorney fees when there has not been "payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner." The plaintiff in *Sintra* successfully brought a takings claim, and thus was eligible for attorney fees under RCW 8.25.075. *Sintra*, 131 Wn.2d at 663, 666. As *Sintra* illustrates, Kinderace is also entitled to attorney fees if

it prevails in its inverse condemnation claim. Since the City's decision was a taking of Kinderace's property, RCW 8.25.075(2) plainly applies.

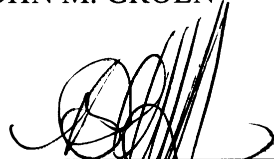
CONCLUSION

This case turns on the legal effect of the approved BLA. Washington law is clear that a division of land through the BLA process creates a legal lot. As a legal lot, it carries all the normal attributes of ownership, including the right to make some economically viable use. By denying the RUE, there is no economically viable use available for this discrete and legal parcel. Accordingly, there is a regulatory taking, and this Court is urged to so hold.

DATED: December 15, 2015.

Respectfully submitted,

JOHN M. GROEN



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DECLARATION OF SERVICE

I, Brien P. Bartels, declare that I am a citizen of the State of Washington, that I am over the age of 18, and not a party to this action; and that on December 15, 2015, I caused a true copy of the foregoing APPELLANT'S REPLY BRIEF to be served on the following persons via First-Class Mail:

Michael R. Kenyon
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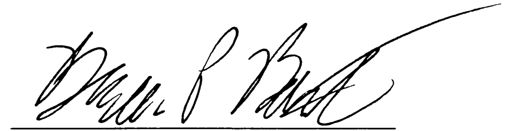
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 15th day of December, 2015, at Bellevue, Washington.



BRIEN P. BARTELS
Legal Secretary