NO. 73409-1-I

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

KINDERACE, LLC,
a Washington limited liability company,

Appellant,

v.

CITY OF SAMMAMISH, a Washington municipal corporation,

Respondent.

BRIEF OF RESPONDENT CITY OF SAMMAMISH

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I. INTRODUCTION

This appeal is the culmination of multiple unsuccessful attempts by Appellant Kinderace, LLC ("Kinderace") to invalidate Respondent City of Sammamish's ("City's") proper denial of an application for a Reasonable Use Exception ("RUE"). Under the RUE application, Kinderace sought to construct 11,974 square feet of impervious surface almost entirely within the protected stream, wetland and associated buffers of Kinderace's property, even though that property had previously — and lucratively — been developed by Kinderace's managing member, Elliott Severson. CP 56-65; CP 234-239; CP 1448; CP 524-525.

Kinderace is the corporate alter ego of Elliot Severson. CP 2022; CP 299-301. After completing the multi-million dollar Plateau Professional Center development across three parcels he owned, Mr. Severson executed a boundary line adjustment ("BLA") to carve off a portion of one of the developed parcels, Parcel 342506-9032 ("Parcel 9032"), and transferred that portion of Parcel 9032 to Kinderace. CP 539; CP 542-544; CP 615-616. The transferred portion of Parcel 9032, however, was almost entirely encumbered by stream and wetland buffers protected from development by environmental regulations adopted by in the City Council *after* the development of Parcel 9032. CP 539; CP 542-544. Kinderace sought the RUE in order to circumvent the City' environmental protection regulations. CP 56-65; CP 180; CP 182.

The City denied the RUE because the entirety of Parcel 9032 had been previously developed by Mr. Severson, thereby more than amply providing him with full and profitable economic use of his property. CP 71-84.

On appeal of the City's RUE denial, the Hearing Examiner aptly described Kinderace's efforts to use the BLA to justify an RUE as an effort to "shrink the size of Parcel 9032, after a reasonable use had been obtained and after more restrictive sensitive area regulations had been adopted, such that it no longer contain[ed] the portion of the lot that was actively used." CP 1793-1794.

Even before the denial of the RUE, Kinderace had filed a takings lawsuit in Superior Court. In response to the Hearing Examiner's decision, Kinderace then filed a petition under the Land Use Petition Act, RCW 36.70C, and a renewed takings suit, in Superior Court. CP 1-6; CP 2555-2609. The Superior Court consolidated, and then dismissed, both matters. CP 2055-2058; CP 2397-2399. In part, the trial court ruled that Kinderace had "achieved reasonable beneficial use of Parcel 9032 as part of the joint development with Parcel 9058 for the Plateau Professional Center project." CP 2398.

On appeal to this Court, Kinderace restates its unsuccessful briefing before the trial court on the takings issue. The City should likewise reject Kinderace's appeal, and affirm the trial court's decision that Kinderace was

not — as a matter of both fact and law in this case — denied all economically viable use of the property.

II. RE-STATEMENT OF THE ISSUES

A. Does a taking occur for constitutional purposes where a city's protective environmental regulations do not deny all economically beneficial use of a parcel because the parcel was developed in a fully economically viable manner *prior to* the enactment of such protective environmental regulations? Answer: No.

B. Does a boundary line adjustment — a legal tool to make minor changes to existing property lines between two or more contiguous parcels[1] — create a new parcel with a new bundle of property rights, including the right to make a new economic use of the parcel? Answer: No.

III. RE-STATEMENT OF THE CASE

A. Factual Background.

1. Severson's efforts to jointly develop Parcels 9032, 9039 and 9058.

In 1995, prior to the City's incorporation, the owner of Parcel 9032 coordinated with adjoining property owners to the north (Parcel 9039) and to the northeast (Parcel 9058) to petition the King County Council to allow commercial/office development on their properties. CP 403; CP 295-297;

[1] *See* WAC 458-61A-109.

CP 244-254. That joint effort was successful, and the King County Council adopted Ordinance No. 12061 rezoning those parcels accordingly. Id. Shortly thereafter, Elliot Severson ("Severson") and his business partners, Ed and Mark Roberts, acquired the development rights to all three parcels. CP 1418-1419.

Severson proceeded with joint development of the three lots. CP 406-415; CP 1799. The "Plateau Professional Center" was constructed in two phases. In 2002, construction commenced on Phase 1 of the project, consisting of a Starbucks and medical office building on Parcel 9039. CP 337; CP 618; CP 1420-21. The design of Phase 1 provided mutual vehicle access and circulation to future Phase 2 development on Parcels 9032 and 9058. Id.

2. Joint development of Parcels 9032 and 9058 allowed Severson to get a substantial return on his investment.

Severson — through his alter ego, SR Development, LLC[2] — began construction on Phase 2 of the Plateau Professional Center in 2003. CP 386-398. The development plan called for the joint development of Parcels 9058 and 9032. Id.; CP 384; CP 444-452. Parcel 9058 was designed to house a KFC and Taco Bell restaurant, and a Kindercare daycare facility with playground. Id.; CP 256-268.

[2] Severson owns 50% of SR Development. CP 271; CP 609.

Parcel 9032, the parcel at issue in this appeal, was intended for use as a storm water pond. Id.; CP 265. Severson, on behalf of SR Development, purchased Parcel 9032 in June 2004. CP 435-437. Severson testified that the intensity of the two-phase Plateau Professional Center development project was only possible because of the use of Parcel 9032 for storm water detention:

> We made a deal [to purchase Parcel 9032] to really save our investment in 9058, because we had so much money sunk into 9058 that the only way we could make that work was if we could get two uses on 9058. And the only way we could do that is if the detention pond was not located on 9058 but was elsewhere. And the elsewhere was north of the creek on 9032.

CP 1448. In accordance with Severson's plan to jointly develop Parcels 9032 and 9058 as the Plateau Professional Center, Parcel 9032 was referenced on several applications filed with the City related to the Phase 2 development from 2003 through May 2004. CP 444-452; CP 809-823; CP 444-452; CP 384; CP 1168-1182. The Plateau Professional Center development, including both Parcels 9032 and 9058, was completed in July 2005. CP 1182; CP 1434.

Parcel 9058 sold for $3,815,000 in 2006. CP 524-525.[3] As

[3] Parcel 9032 was purchased for $175,000. CP 435. Parcel 9058 was purchased for $888,140. CP 351.

Severson testified that the intensity of development and the related sale price were only possible because Parcel 9032 was used as the storm water retention pond serving Parcel 9058. CP 1448; CP 1505-1506.

3. The City subsequently adopts regulations for environmentally critical areas that affect Severson's ability to further develop Parcel 9032.

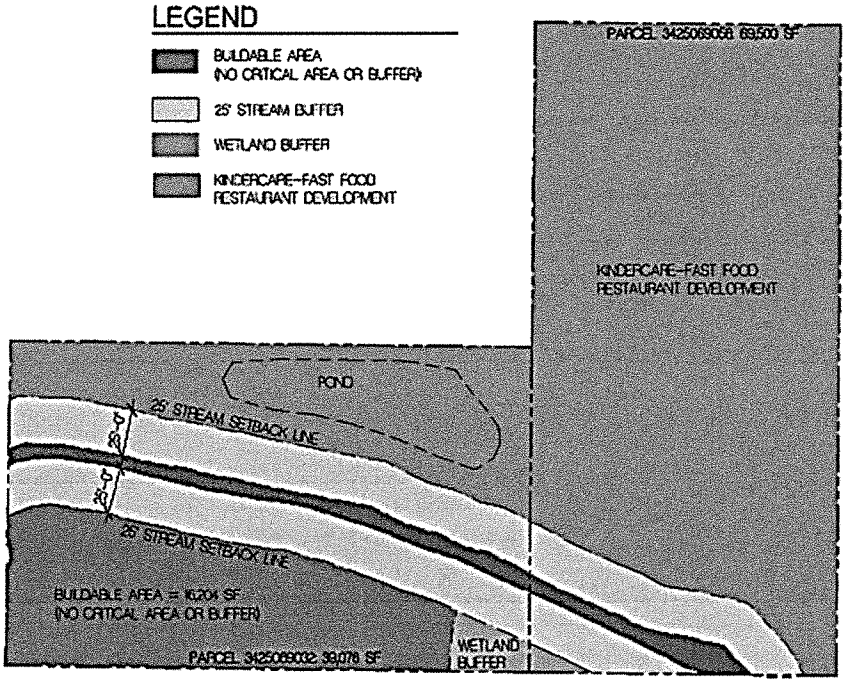
On December 20, 2005, in compliance with the Growth Management Act and the City's Comprehensive Plan, the Sammamish City Council adopted Ordinance No. O2005-193 amending Sammamish Municipal Code ("SMC") Chapter 21A.50 regarding environmentally critical areas ("ECA Regulations"). CP 462-522. The ECA Regulations increased the buffers for both bogs and streams, in accordance with the best available science, to "[p]rotect[] unique, fragile, and valuable elements of the environment including, but not limited to wildlife and its habitat."[4] CP 499; CP 489. The new laws went into effect January 3, 2006, and were adopted after extensive public notice and participation. CP 465.

The topography of Parcel 9032 would make construction difficult under the adopted ECA Regulations. CP 499; CP 489; CP 73-74; CP 331. At the time the ECA Regulations went into effect, George Davis Creek bifurcated Parcel 9032, and was identified as a stream of special significance. The associated buffer for the entire creek was also expanded.

[4] SMC 21A.50.010(3).

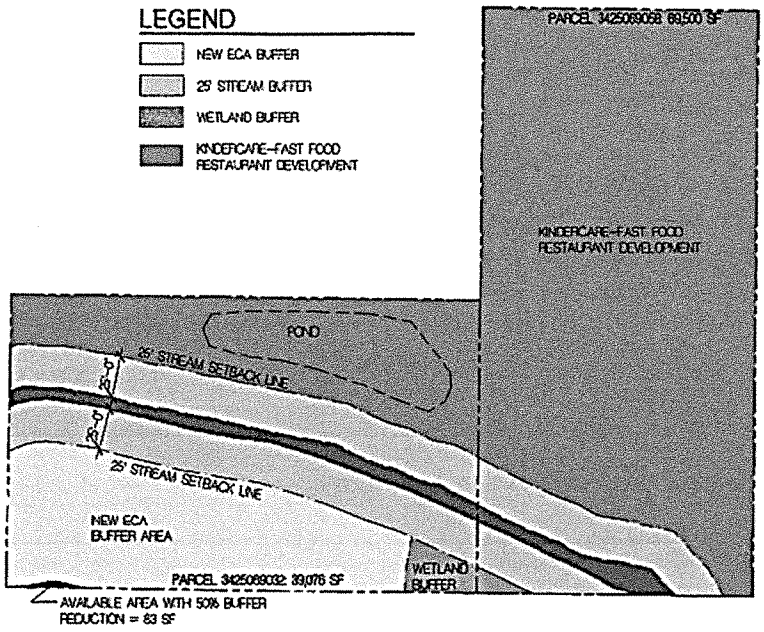
Id.; CP 497; CP 618.

Prior to the adoption of the ECA Regulations, Severson had chosen to utilize the portion of Parcel 9032 lying to the north of the creek as the storm water pond necessary to the development of the Plateau Professional Center. CP 384. As they existed in July 2005, prior to the adoption of the ECA Regulations, Parcels 9032 and 9058 looked like this:



CP 1142.

Subsequent to the adoption of the ECA Regulations, the southern portion of Parcel 9032 was subsumed by newly expanded stream, wetland and bog buffers, depicted this way:



CP 1143.

4. Severson seeks an exception to the City's regulations for environmentally critical areas in order to further develop Parcel 9032 as a parking lot.

In August 2006, Severson's representative met with the City regarding possible development of the remaining portion of Parcel 9032 as a parking lot. CP 622-624; CP 1517; CP 1544. Pursuant to the City's ECA Regulations, construction within wetland, stream and associated buffers is only authorized by means of buffer averaging, buffer modification, or RUE approval. CP 622-624; SMC 21A.50.070(2)(a). An RUE under the City's code is an approval mechanism that allows the City's environmental regulations to be relaxed where the regulations would otherwise "deny all reasonable use of the property." SMC 21A.50.070(2)(a)(i). SMC 21A.15.950 defines "reasonable use" as "a legal concept articulated by

federal and state courts in regulatory taking cases."

During the meeting, City staff expressed concern "that the proposed parking lot does not satisfy the criteria for approval of a reasonable use exception, in part because the property is already in use [as a stormwater detention facility serving parcel 9058]." CP 623. Stated differently, the Plateau Professional Center project (KFC/Taco Bell, Kindercare, and associated stormwater control facilities) provided a reasonable use for all of the parcels involved in that project, including Parcel 9032. CP 622-624.

5. Severson executes a BLA to shrink existing Parcel 9032 to the area containing the stream, wetland and associated buffers.

In 2008, Severson's representative applied for and was granted a BLA, which adjusted the boundaries of Parcel 9032 to carve off the detention pond on the northern portion of the parcel, which then became part of Parcel 9058. CP 539; CP 542-544. By his own action, Severson voluntarily adjusted the boundaries of Parcel 9032 so that the entire parcel was now constrained by the stream, wetland area and associated buffers. Id. Because Severson's application met all of the requirements for a BLA under the City's municipal code, the City approved the BLA. CP 530; CP 1614-1616; SMC Chapter 19A.24, et *seq*. The BLA contained an "Approval Note" that warns: "This request qualifies for exemption under SMC 19.20.010. It does not guarantee the lots will be suitable for development

now or in the future." CP 530.

Severson thereafter filed an appeal of the assessed value of Parcel 9032 with King County. CP 738-742; CP 746; CP 1614-1616. On appeal, his representative successfully argued that wetlands to the north, south and east made the lot unusable, and that these sensitive areas precluded further development. Id. The appeal was granted. Id. As a result of Severson's own appeal, the assessed value of post-BLA Parcel 9032 was reduced from $198,600 to $60,000, and then further reduced to $50,000. CP 744; CP 746; CP 606.

6. Kinderace attempts to further develop Parcel 9032 by seeking an RUE for construction of a pizza restaurant.

Severson formed Kinderace on September 18, 2012. CP 299. Two days later, he personally transferred ownership of Parcel 9032 from SR Development to Kinderace. CP 615-616. Kinderace is fully owned by Camtiney, LLC, of which Severson is the managing member. CP 299; CP 301. Camtiney's other members are Severson's wife and three children. CP 301.

On July 5, 2013, Kinderace submitted a Base Land Use application seeking an RUE for further development on Parcel 9032. CP 56-65; CP 180; CP 182. The application proposed to build a Pagliacci Pizza restaurant with parking, resulting in 11,974 square feet of impervious surface, nearly

all of it in the stream and wetland buffers. Id. The application from Kinderace, a corporation that had existed for only one year, refers to "having owned the property for nine (9) years." CP 61. Further, Kinderace contended that it had been denied all reasonable use of Parcel 9032 as its boundaries are presently situated, but did not refer to the substantial economic use derived as a result of the development of the Plateau Professional Center. CP 56-65.

The City issued its written decision denying the RUE application on November 15, 2013. CP 71-84. The detailed staff report, prepared by Senior Planner Evan Maxim, concluded that the criterion in SMC 21A.50.070(2)(a)(i) ("First RUE Criterion") was not met because reasonable use of Parcel 9032 had previously been achieved as part of the development of the Plateau Professional Center. Id.

B. Procedural Posture.

The procedural posture of this case below is somewhat convoluted.

1. Kinderace files a takings claim before the City denies the RUE.

On June 17, 2013, two weeks prior to submitting its RUE application, Kinderace filed suit against the City in King County Superior Court. CP 1-6. Its complaint alleged that Parcel 9032 was subject to a regulatory taking due to environmental regulations precluding further

development. Id. Because Kinderace had initially overlooked the need to exhaust administrative remedies before filing its initial takings lawsuit, Kinderace subsequently applied for the RUE at issue here. CP 56-65.

2. RUE denial, administrative appeal and LUPA hearing.

Kinderace appealed the City's decision to deny the RUE. CP 46-53; CP 164-168. After two days of testimony, the Hearing Examiner issued a detailed decision affirming the City's denial of the RUE. CP 1777-1799. In reaching that decision, the Hearing Examiner found in pertinent part:

> The question now is whether the new parcel Severson created (by shrinking the size of Parcel 9032, after a reasonable use had been obtained and after more restrictive sensitive area regulations had been adopted, such that it no longer contains the portion of the lot which was actively used in the 2003/2004 development) is itself eligible for a reasonable use exception. It is not.

CP 1793-1794.

Kinderace appealed that decision to the King County Superior Court under LUPA — RCW 36.70C *et seq*. CP 2555-2609. In its LUPA petition, Kinderace asserted that the Hearing Examiner's decision was contrary to all of the LUPA criteria for judicial review set forth in RCW 36.70C.130, including RCW 36.70C.130(1)(f), which authorizes a court to grant relief if "the land use decision violates the constitutional rights of the party seeking relief." Id.

3. Renewed takings claim, and consolidated hearing on LUPA and taking.

Upon the filing of the LUPA petition, the Court consolidated the LUPA action with the takings case by stipulation. CP 2628-2629. The takings cause of action had three separate theories: (1) a total regulatory taking; (2) partial regulatory taking; and (3) physical taking of access. CP 1-6.

The Court conducted a LUPA hearing on the merits, specifically inviting briefing and argument on the regulatory takings claim. CP 28; CP 1800-1851; CP 1957-1989. By order dated October 22, 2014, the Hon. Laura Inveen dismissed the LUPA petition, finding that Kinderace failed to meet its statutory burden to establish satisfaction of the LUPA criteria for relief. CP 2055-2058. The order additionally stated "that to the extent this decision does not resolve all claims the parties shall meet and confer" regarding a case schedule. CP 2057.

4. Cross-motions for summary judgment on takings claim.

The parties disagreed as to whether the October 22, 2014 order foreclosed Kinderace's takings claim (since a court is authorized to address takings and other constitutional claims under LUPA, RCW 36.70C.130(1)(f)). CP 2059-2083; CP 2343-2348. Kinderace argued that "the regulatory Takings Claim is independent of [Kinderace's] Land Use Petition Act (LUPA) claim." CP 2100. The City argued that implicit in the

Court's October 22, 2014 decision was a ruling that Kinderace had failed to show "the land use decision violate[d] [its] . . . constitutional rights." RCW 36.70C.130(1)(f); CP 2064-2069.

As the parties disagreed about what issues and claims persisted after the LUPA hearing, the City prepared and filed a motion for summary judgment of dismissal generally based on the doctrines of the law of the case, collateral estoppel, and res judicata. CP 2059-2083. Kinderace filed a cross-motion for partial summary judgment, based on its regulatory takings claim. CP 2343-2348. After extensive briefing, the Court granted the City's motion and denied Kinderace's cross-motion, finding in pertinent part:

> [C]onsistent with affirming the Hearing Examiner's denial of a Reasonable Use Exception, Plaintiff Kinderace achieved reasonable beneficial use of Parcel 9032 as part of the joint development with Parcel 9058 for the Plateau Professional Center project and therefore, the Defendant City of Sammamish is not liable for a regulatory taking.

CP 2398.

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellant is seeking review of three decisions by the trial court, which on appeal are subject to distinct standards of review.

1. Dismissal of Appellant's LUPA petition on the merits.

Kinderace assigns error to the October 22, 2014 order dismissing on the merits Kinderace's LUPA petition. Appellant's Brief at 1. Kinderace, however, provides no argument or analysis regarding this claimed error. The text of Kinderace's brief focuses solely on its regulatory takings claim and, as Kinderace argued below, "the regulatory Takings Claim is independent of [Kinderace's] Land Use Petition Act (LUPA) claim." CP 2100.

Kinderace has effectively abandoned its first assignment of error relating to the dismissal of its LUPA petition on the merits. A party abandons an issue by failing to pursue it on appeal by failing to brief the issue. State v. Wood, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); Talps v. Arreola, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) (appellant had abandoned a claim on appeal when she failed to include argument or cites to authority on the issue in her briefs). Likewise, a party may not revive an issue on appeal omitted from its opening brief by raising it for the first time on reply. Sacco v. Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (citing RAP 10.3(c)). Accordingly, this Court should not consider Kinderace's first assignment of error.

2. Grant of summary judgment to City and denial of summary judgment to Kinderace.

Kinderace additionally assigns error to the trial court's dismissal of its constitutional takings claim on the City's motion for summary judgment, and the trial court's related denial of Kinderace's cross-motion for partial summary judgment. Appellant's Brief at 1. Appellate review of a decision to grant summary judgment is de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. Atherton Condo. Ass'n. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. The Trial Court Correctly Dismissed Kinderace's Takings Claim.

The trial court dismissed Kinderace's regulatory takings claim on the basis that the City's ECA Regulations did not deny "all economically viable use" of Parcel 9032 because "Kinderace achieved reasonable beneficial use of Parcel 9032 as part of the joint development with Parcel

9058 for the Plateau Professional Center project." CP 2398.

1. No taking occurred where Severson has put Parcel 9032 to full beneficial economic use prior to the adoption of the ECA Regulations.

A threshold inquiry in a regulatory takings claim is whether a city's decision denies a landowner a fundamental attribute of property ownership, such as the right to possess, exclude others, dispose of, or to make some economically viable use of the property. Kahuna Land Co. v. Spokane County, 94 Wn. App. 836, 841, 974 P.2d 1249 (1999); Guimont v. Clarke, 121 Wn.2d 586, 601–02, 854 P.2d 1 (1993); Lucas v. S.C. Coastal Conn., 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (establishing that total deprivation of economic value is a taking).

The landowner has the burden on this issue (Kahuna, 94 Wn. App. at 841), and must further demonstrate that the mere enactment of a regulation constitutes a taking. Guimont, 121 Wn.2d at 605 (*citing* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493, 107 S.Ct. 1232, 1246, 94 L.Ed.2d 472 (1987) (emphasis added).

A property owner has no constitutional right to a second use of land, and a regulation that impacts a property's highest and best use is not a taking. Ventures Nw. Ltd. P'ship v. State, 81 Wn. App. 353, 366, 914 P.2d 1180 (1996) (*citing* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926)); *see also* Deltona Corp.

v. U.S., 657 F.2d 1184, 1193 (Fed. Cir. 1981).

Kinderace argues that a taking of Parcel 9032 occurred "[i]n 2006, [when] the City imposed more restrictive development regulations to protect environmentally critical areas — here, a stream, wetlands, and their designated buffers." CP 1801.

The Superior Court properly determined that Kinderace's takings claim fails for many reasons, chief among them that at the time the ECA Regulations were adopted, Parcel 9032 had already been fully developed — by Severson's own choice — as part of the Plateau Professional Center. CP 2398. The adoption of the ECA Regulations did not prohibit all use of Parcel 9032; the entire metes and bounds of Parcel 9032 had already been used for the Plateau Professional Center development, as evidenced on the permit applications and testimony of the parties. CP 1572-1573; CP 1448; CP 1505-1506.

Moreover, the facts establish that economic use of Parcel 9032 was significant. In 2006, after completing the Plateau Professional Center Phase 2, Parcel 9058 sold for $3,815,000. CP 524-525. The intensity of development and substantial sale price were only possible because of the use of Parcel 9032 for the storm drainage pond to support the commercial development on Parcel 9058. CP 1572-1573; CP 1448; CP 1505-1506.

Severson testified that Parcel 9058 would have been a loss without the acquisition and development of Parcel 9032. CP 1448; CP 1505-1506. Kinderace cannot now persuasively argue that the economic return Severson received from the development of Parcel 9032 was somehow less than economically viable or reasonable, and such an argument does not form a valid basis for a takings claim.

Kinderace disputes that the prior use of Parcel 9032 matters, and argues instead that the Court should view "the present configuration of parcel 9032" in a vacuum. Appellant's Brief at 10. Kinderace relies on Lucas, *supra*, 505 U.S. 1003 (1992), to argue that a taking occurs when a current reasonable use cannot be achieved. However, Lucas is easily distinguished. Unlike here, Lucas did not involve any prior development of the subject property — a distinction noted by the Superior Court in its order dismissing Kinderace's takings claim. CP 2398.[5]

Similarly, none of the other cases cited by Kinderace support its takings argument, as none involve prior development of the subject property. *See* Powers v. Skagit County, 67 Wn. App. 180, 183, 835 P.2d 230 (1992) (owner of property designated as residential plat sought building permit; holding question of fact existed, precluding summary judgment for

[5] "The court further finds that caselaw cited by Plaintiff is all factually distinguishable and does not address the legal issues at hand ... Lucas v. South Carolina Costal Council, 505 U.S. 108 (1992) did not address joint development of parcels."

County, as to whether taking occurred where permit denied after property placed within floodway by new Federal Emergency Management Agency floodway designations adopted by County during pendency of permit application); Guimont, *supra*, 121 Wn.2d at 600 (holding no taking occurred in suit brought by group of mobile park owners challenging Mobile Home Relocation Assistance Act, which required owners to pay relocation assistance to park's tenants if owner wants to close park or convert property to another use); Sparks v. Douglas County, 127 Wn.2d 901, 908, 904 P.2d 738 (1995) (property owners claimed required dedications for short plat applications were unconstitutional takings of property; holding documented deficiencies in right-of-way width and road surfacing were sufficient to show the necessary relationship between subdivision impacts and a dedication requirement such that no taking occurred); City of Des Moines v. Gray Businesses, LLC, 130 Wn. App. 600, 614, 124 P.3d 324 (2005) (holding no taking where City limited landowners' right to lease property for mobile home use, where right to operate as nonconforming mobile home park is not fundamental attribute of ownership); Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990) (takings claim arising from proposed construction of church on property partially encumbered by wetland and bog dismissed because plaintiff failed to exhaust administrative remedies before filing suit). All

are distinguished on that basis.

Here, Severson obtained a full and profitable prior use of the entirety of Parcel 9032 as part of Plateau Professional Center, Phase 2. Both the Hearing Examiner and the Superior Court correctly determined that, as a matter of law, when Severson carved off a portion of Parcel 9032 by means of a BLA, he did not erase the property's history of prior use. CP 1793-1794; CP 1448.

2. The BLA does not erase the development history of Parcel 9032, nor in any manner impact the applicability of the adopted ECA Regulations.

Kinderace next asks the Court to find that the 2013 BLA — by which Severson carved off the detention pond on the northern portion of Parcel 9032, collapsing the boundaries of Parcel 9032 so that the entire parcel was constrained by the stream, wetland area and associated buffers — created a *new* legal lot, and that a taking occurred because that new lot is not "developable" due to the 2006 ECA Regulations. Appellant's Brief at 11-12. This argument is not supported by either fact or law.

The approval of a BLA does not create a new legal lot. RCW 58.17.040(6) plainly states that a BLA may not be used to create new lots, but rather is a tool used to adjust the boundaries of existing lots. In this light, Kinderace missed that mark when it argues that "the trial court erred in ruling the current Parcel 9032 was used in joint development with Parcel

9058 . . . because Parcel 9032 did not exist as a legal parcel in 2004 when Parcel 9058 was developed." Appellant's Brief at 12.

Kinderace relies only on City of Seattle v. Crispin, 149 Wn.2d 896, 71 P.3d 208 (2003), to support its argument that a BLA creates a new legal lot, with a new bundle of property rights. Kinderace's strained reading of Crispin is simply wrong (as the Superior Court also noted).[6] In Crispin, the sole issue before the Court was whether the reconfiguration of a boundary line which resulted in a building site that did not previously exist violated the state's subdivision code. Id. at 901-904. The Crispin court did not determine that any boundary line adjustment automatically creates a new, buildable lot. Rather, the Crispin court examined "the specific statutory language which states as long as there are no 'new' lots created, the reconfiguration is exempt [from the state's subdivision code]." Id. at 904.

Kinderace's attempts to parse selectively from Crispin should be rejected. For example, while Kinderace asserts that Crispin determined that a BLA always results in a "buildable site" — and therefore, the BLA in this case automatically created a buildable site that the ECA Regulations rendered unusable — the Crispin court actually held that the mere "fact that

[6] CP 2398: "The court further finds that caselaw cited by Plaintiff is all factually distinguishable and does not address the legal issues at hand. E.G. [sic] in City of Seattle v. Crispin, 149 Wn.2d 896 (2003), the issue was whether a reconfiguration of a boundary line which resulted in a building site that did not previously exist violated the state subdivision code, RCW 58.17 and comparable ordinance. The issue was not whether any boundary line adjustment automatically created a buildable lot."

a buildable site was created [in this case] does not prevent application of the boundary line adjustment exemption found at RCW 58.17.040(6)." Id. at 906. In this case, Severson's 2008 BLA did not create a "buildable site" on the southern portion of Parcel 9032 where none previously existed. The Crispin decision does not support Kinderace's theory that approval of a BLA somehow erased the economically viable development history of Parcel 9032 so as to require the City to permit Kinderace a second economically viable use of the same site.

3. A BLA does not create development rights in a reconfigured parcel, as a matter of law.

Kinderace next argues that the City's approval of the BLA necessarily transformed the southern portion of Parcel 9032 into a new lot with new development rights, since state law forbids a boundary line adjustment that results in an "unbuildable" lot. Appellant's Brief at 12-13. For these purposes, Kinderace posits that an "unbuildable lot" is a lot that "contains insufficient area and dimension to meet minimum requirements for width and area for a building site." RCW 58.17.040(6).

As a preliminary matter, the BLA was a unilateral action by Severson and his business partners. The City could not initiate a BLA, nor could it deny the BLA as long as Severson met the checklist of minimal requirements in the City's municipal code. The City received a valid BLA

application, and accordingly had no legal choice but to grant it. *See* R/L Associates, Inc. v. Klockars, 52 Wn. App. 726, 733, 763 P.2d 1244 (1988); *see also* Cox v. City of Lynnwood, 72 Wn. App. 1, 863 P.2d 578 (1993) (holding city acted improperly when it looked beyond the BLA provisions of its code to deny BLA; property owners were entitled to damages arising from denial of application). A city is not permitted to look beyond the limited scope of review defined in code and state law. Id. The motives for making a BLA are numerous and not part of a city's review. CP 1615-1616.[7]

The BLA approval means only that Severson's application satisfied the requirements of City Code for the approval of a BLA. *See* SMC Chapter 19A.24. It does not guarantee any right to develop the newly configured lot under other portions of City Code. Id. In order to qualify for a BLA in Sammamish, an applicant must prove that the adjustment will not "[r]esult in a lot that does not qualify as a building site pursuant to this title." SMC 19A.24.020(4)(b). The Sammamish Municipal Code specifically defines a "[b]uilding site" as "an area of land, consisting of one or more lots or portions of lots, that is:

> (1) Capable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional

[7] Severson obtained the benefit of lowering the assessed value and associated property tax burden on 9032. CP 744; CP 746; CP 606.

> standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions; or
>
> (2) Currently legally developed.

SMC 19A.04.060 (emphasis added).[8]

Pursuant to the City's Code (and the appellate authority cited above), the City was required to approve the BLA here because Severson showed that the adjustment would not "[r]esult in a lot that does not qualify as a building site pursuant to this title." SMC 19A.24.020(4)(b). Further, Parcel 9032 was "[c]urrently legally developed" at the time of the BLA application, having been jointly developed as part of the financially successful Plateau Professional Center. SMC 19A.04.060(2); CP 1448; CP 1505-1506. Moreover, the proposed reconfigured boundaries of Parcel 9032 would result in an "**area of land, consisting of one or more lots or portions of lots**" that is "currently legally developed," because Parcel 9032 and Parcel 9058 are "currently legally developed." SMC 19A.04.060 (emphasis added); CP 1448; CP 1505-1506. Under the City's BLA provisions in its Code, Severson did not need to prove that reconfigured

[8] Kinderace asserts, without citation to supporting legal authority, that a "building site" under RCW 58.17.040(6) somehow equates to a developable legal lot. This is incorrect. "Chapter 58.17 RCW does not contain a definition of "building site."" Mason v. King Cnty., 134 Wn. App. 806, 811, 142 P.3d 637 (2006). "[L]ocal governments are free to define the dimensions of a "building site" so long as that definition is consistent with applicable local zoning requirements." Id. at 812.

Parcel 9032 was capable of being developed in order to obtain a BLA. SMC Chapter 19A.24. Rather, the corollary is true: the City's approval of the BLA did not somehow transform reconfigured Parcel 9032 into an area that was capable of being developed.

Kinderace again misses the mark in arguing, "[I]f the City believed that the old Parcel 9032 was included as a joint development with Parcel 9058, that may have been a legitimate reason to deny the BLA." Appellant's Brief at 12. By approving the BLA as Severson himself applied for it, the City merely confirmed that Severson met the Code's BLA requirements, and the Code does not guarantee (or even address) that an approved BLA results in a developable piece of property. Rather, Under R/L Associates and Cox, *supra*, the City would have faced Severson's damages claim if the City had denied the BLA. *See* 52 Wn. App. at 733; 72 Wn. App. at 6.

Kinderace's claim that it "necessarily relied on the certainty that Parcel 9032 was a legal lot with the normal rights associated with a legal lot" is disingenuous. Appellant's Brief at 14-15. Kinderace owns exactly what it knowingly and voluntarily acquired in 2012, a single lot that was previously used in joint development with neighboring parcels, and fully encumbered by critical areas. When the BLA application was filed, the City specifically advised Severson that a BLA would not create any new

development rights on Parcel 9032. CP 1614-1617. The plain terms of the note imprinted on the face of the BLA approval reiterate that advice: "This request qualifies for exemption under SMC 19.20.010. It does not guarantee that the lots will be suitable for development now or in the future." CP 530.

4. Kinderace's inability to build a pizza restaurant does not constitute a taking.

As analyzed above, the undisputed fact that Kinderace has taken full advantage of the entirety of Parcel 9032 to its substantial economic gain resolves the takings case in the City's favor. Kinderace's claimed inability to develop a particular pizza restaurant does not further its case.

It is axiomatic that the mere denial of a permit for one particular use does not establish the absence of any economically viable use, because a regulation is not a taking even though it may impact the property's highest and best use is not a taking. Ventures Nw. Ltd. P'ship, *supra*, 81 Wn. App. at 366 (*citing* Village of Euclid, Ohio, *supra*, 272 U.S. at 384). Moreover, to a make its challenge regarding the economic impact of a land use regulation, Kinderace must establish "that the regulation denies all economically beneficial use of the property." Guimont, 121 Wn.2d at 600. Washington courts have consistently found that this is a substantial hurdle to clear, and "[f]acial challenges in which the court determines that a

regulation denies all economically viable use of property should prove to be a relatively rare occurrence." Margola Associates v. City of Seattle, 121 Wn.2d 625, 646, 854 P.2d 23 (1993) (quoting Presbytery of Seattle, *supra*, 114 Wn.2d at 335) (internal quotation omitted).

A denial of the ability to use property in the manner specifically requested — the construction and operation of a high-volume pizza restaurant and adjacent parking — does not constitute a taking. *See* Gray Businesses, LLC, *supra*, 130 Wn. App. at 613 (holding landowners' right to use property for a particular business is not a fundamental attribute of ownership). Guimont — a case Kinderace relies upon — actually supports the City's position here. In Guimont, the Court noted that the landowners could propose other uses for the property, and thus no taking had occurred. 121 Wn.2d at 608.

5. Presbytery is inapposite.

Kinderace's reliance on Presbytery of Seattle v. King County is misplaced, as it is easily distinguished. Presbytery involved the proposed development of a parcel of land that housed, in part, a wetland and protected bog in the City of Federal Way. 114 Wn.2d at 324-25. As previously mentioned, Presbytery does not involve or discuss the issue of prior development of a parcel, or the impact resulting on a takings claim from a second proposed use. Id.

Kinderace attempts to selectively quote from Presbytery to infer that the court must ignore the development history of a parcel when examining a takings claim. This issue is not discussed in Presybtery, nor any of the cases cited by Kinderace for that matter. The Presbytery court noted that facial challenges to a regulation — a takings claim based on the notion that a regulation denies all economically viable use to a parcel — "**should prove to be a relatively rare occurrence.**" Id. at 335.

Moreover, Presybtery affirmatively rejected "piecemealing" — *i.e.*, permitting a takings claim where only a portion of a parcel is burdened by environmental regulations, while the other is capable of development and/or developed. Id. at 334 (*overturning* Allingham v. Seattle, 109 Wn.2d 947, 749 P.2d 160 (1988)). This is effectively what Severson proposed in this case: Severson knowingly constructed buildings and paved parking on one parcel, knowingly developed a neighboring parcel for use as a storm water detention pond to serve the constructed buildings and parking, and — after the ECA Regulations modified the buffers for the protected portion of that parcel — now seeks compensation for a claimed taking of the very property that he himself knowingly and profitably developed. Under Presybtery, this claim should be rejected.

C. The City Should be Awarded its Reasonable Attorney's Fees on Appeal.

This Court should award the City its attorneys' fees pursuant to RCW 4.84.370, which mandates an award of attorneys' fees and costs to the substantially prevailing party on appeal before the court of appeals of a decision by a City to deny a development permit involving a conditional use, variance, or similar land use approval or decision. Here, the City's decision to deny the RUE has been upheld before the Hearing Examiner and the Superior Court. Pursuant to RCW 4.84.370(2), the City is the prevailing party and is entitled to its attorneys' fees and costs on appeal. *See also* Baker v. Tri-Mountain Resources, Inc., 94 Wn. App. 849, 973 P.2d 1078 (1999).

Kinderace's claim for fees should be denied. It is not the prevailing party. By its plain terms, RCW 8.25.075 applies only where:

> (a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or
>
> (b) The proceeding is abandoned by the condemnor.

Neither are applicable here. Additionally, Kinderace's reliance on Sintra v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997), is inappropriate. Sintra involved an appeal from a jury's award on plaintiff's inverse condemnation claim. Id. at 651. The jury's verdict was affirmed on appeal.

Id. at 666. As the prevailing party on the issue of takings — unlike Kinderace in this case — the Court ruled that Sintra was entitled to attorneys' fees on appeal. Id. Kinderace is not the prevailing party, and accordingly not entitled to fees.

Finally, RAP 18.1(b) requires "more than a bald request for attorney fees." Hurley v. Port Blakely Tree Farms L.P., 182 Wn. App. 753, 774, 332 P.3d 469, 480 (2014) *review denied sub nom.* Hurley v. Campbell Menasha, LLC, 182 Wn.2d 1008, 344 P.3d 688 (2015) (*quoting* Richards v. City of Pullman, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006)). Kinderace makes no argument as to why attorney fees under RAP 18.1 are proper, and the Court should deny Kinderace's request on that basis.

V. CONCLUSION

Parcel 9032 was an integral part of the Plateau Professional Center development. Kinderace failed to establish that the City's environmentally critical areas regulations "deny all reasonable use of the property." By Severson's own hand, Parcel 9032 was jointly developed and the BLA occurred years after the ECA Regulations encumbered the remainder of the property. Based on the City's code and well-established case law, there has been no regulatory taking of Parcel 9032 — Kinderace complains and seeks compensation for a situation entirely its own making.

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RESPECTFULLY SUBMITTED this 9th day of November, 2015.

KENYON DISEND, PLLC

By _____

Michael R. Kenyon
WSBA No. 15802
Charlotte A. Archer
WSBA No. 43062

DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 9th day of November, 2015, I sent for service a true copy of the foregoing *Brief of Respondent City of Sammamish* on the following using the method of service indicated below:

John M. Groen Pacific Legal Foundation 930 G Street Sacramento, CA 95814	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: JMGroen@pacificlegal.org bpb@pacificlegal.org IncomingLit@pacificlegal.org ☐ Court's ECF System

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of November, 2015, at Issaquah, Washington.

Margaret C. Starkey