Supreme Court No. 73409-1 93622-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

KINDERACE, LLC,
a Washington limited liability corporation,

Petitioner,

v.

CITY OF SAMMAMISH,
a Washington municipal corporation,

Respondent.

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On Petition for Review from Division One,
Washington State Court of Appeals, No. 73409-1-I

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

Petitioner Kinderace, LLC, is a Washington limited liability corporation and the owner of the property at issue in this petition, King County Tax Parcel No. 342506-9032 (Parcel 9032).

CITATION TO COURT OF APPEALS' DECISION

Kinderace seeks review of the Court of Appeals' July 5, 2016, published decision in *Kinderace, LLC v. City of Sammamish* (Div. I, No. 73409-1-I) (Appendix A), and Order Denying Appellant's and Respondent's Motions for Reconsideration (Aug. 22, 2016) (Appendix B).

ISSUE PRESENTED FOR REVIEW

Whether the "relevant parcel" inquiry, as set out in *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 335, 787 P.2d 907 (1990), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), allows the court to combine an owner's interests in two legally distinct, but previously commonly-owned, adjacent parcels when determining the extent of property that a court should consider when reviewing a regulatory takings claim.[1] This issue raises a critical and

[1] Case law also refers to the relevant parcel question as the "denominator" or "parcel as a whole" issue.

unresolved question of constitutional law that is currently pending before the U.S. Supreme Court in *Murr v. State of Wisconsin*, Dkt. No. 15-214.

STATEMENT OF THE CASE

A. Kinderace Invested in Commercial Property That the City Later Deemed Both a "Building Site" and a No-Build Area

For over a decade, Elliot Severson, the principal owner of Kinderace, LLC, has been involved in the phased development of three commercial properties in the City of Sammamish. App. A at 2. The lots are located alongside 228th Avenue NE, which is the City's major north/south thoroughfare, just south of a major shopping area. *Id.* Although King County rezoned the lots for commercial use in 1995, the planned development progressed slowly due to a variety of issues, including the City's incorporation in 1999 and immediate issuance of a development moratorium while it adopted new zoning, building, and critical areas regulations.[2] This case concerns the last parcel in the phased development—Parcel 9032.

Once the City lifted the moratorium in 2001, Severson and his partners immediately began developing the lots. Between 2001 and 2004, the City approved a Starbucks and a medical office building and bank on Parcel 9039 and a Kentucky Fried Chicken/Taco Bell restaurant and a Kindercare

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[2] *See* City of Sammamish Ord. No. 2001-77, *available at* http://www.sammamish.us/files/ordinance/O2001-77.pdf.

daycare facility on Parcel 9058—the lots adjacent to the parcel at issue in this case. App. A at 2-3. But in order to build the restaurant/daycare center on Parcel 9058, the City required that Severson and his then partners (SR Development LLC) install a storm water detention pond. *Id.* at 2. Due to wetland buffers on Parcel 9058, the only feasible place to locate the pond was on the northen portion of the adjacent Parcel 9032, which parcel is bisected by George Davis Creek. CP 1784, 1914. The owners agreed to the condition and installed the facility with the intention that the area of Parcel 9032 south of the creek would be reserved for future development:

> From the time we made the decision to buy Parcel 9032, our plan was to use the portion north of George Davis Creek with the development on 9058 and reserve the property south of George Davis Creek for future development. Kenyon [the seller] did not ascribe much value to the land north of George Davis Creek in their asking price due to its small size, odd shape and difficult access to 228th. Although we did not have a specific proposal for developing the land south of George Davis Creek we were comfortable undertaking it as a long term investment given that placing the detention pond for 9058 would fit north of George Davis Creek and not reduce at all what we considered to be the useable area and what Kenyon valued as the useable area namely the area south of George Davis Creek.

CP 2153 (Declaration of Elliott Severson).

Severson and his partners completed the restaurant/daycare facilities in 2005, then sold the developed lot (Parcel 9058) in 2006. App. A at 4. In accordance with the planned development of Parcel 9032, SR Development

applied for two boundary line adjustments in order to place the storm water detention pond onto Parcel 9058—the "intention the entire time was that the detention pond would go with Parcel 9058 since it was the commercial development on Parcel 9058 that was actually using the pond." CP 2155. Severson and his partners did not grant the new owner of Parcel 9058 an easement for the pond and collected no rent for the facility during the pendency of the boundary line adjustment process. *Id.* The "intention was to transfer the pond to 9058 for no consideration." *Id.*

The City reviewed and approved the boundary line adjustments in 2008. App. A at 5. Critically, the City's code prohibited approval of an adjustment if the proposed configuration would "[r]esult in a lot that does not qualify as a building site." SMC 19A.24.020(4). And the code defines a "building site" as 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. Thus, by approving the adjustment, the City confirmed that reconfigured Parcel 9032 constituted a building site. The approved adjustments were recorded in January 2009 along with a warranty deed

transferring the northern portion of old Parcel 9032 to the new owner of Parcel 9058. App. A at 5.

Severson's development expectations were perfectly reasonable when he first acquired Parcel 9032 in 2004. The portion of the lot south of the creek was zoned for commercial use and was more than large enough to accommodate the 25-foot buffers required by the critical areas ordinance while still providing sufficient space for development. CP 1784, 1914. Moreover, between 1995 and 2005, both King County and Sammamish had allowed similar development in close proximity to the stream and wetlands in the area. Indeed, the City itself had undertaken development activities on another adjacent property (Parcel 9053) near the stream, having approved minimal buffers to facilitate the lot's use. CP 1905 and 1907 (graphics showing surrounding development), 1782.

In December 2005, however, the City changed its mind in regard to Parcel 9032. Although the property was zoned commercial, the City, as part of its critical areas ordinance update, designated George Davis Creek as a "stream of significance" subject to 150-foot buffers. As a result, the entire southern portion of Parcel 9032—the portion that Severson had purchased for future development—became completely encumbered by critical area buffers. App. A at 3. Even if the City reduced the buffers by the maximum amount

allowed under the code (a 50 percent reduction), Parcel 9032 would still only have a total of 83 square feet of developable land. CP 1789; CP 3:15-18.

In its current configuration, Parcel 9032 is an undeveloped, 0.75 acre "building site" fronting a major highway. All of the surrounding parcels are developed. Under the City's most recent critical areas policy, there is no opportunity for any economically viable use of Parcel 9032 without a Reasonable Use Exception (RUE), as allowed by SMC 21A.50.070(2)(a)(i).

B. The City Denied a Reasonable Use Exception Due to Development on an Adjacent Parcel

Between 2006 and 2013, Severson—acting first through SR Development then later through Kinderace—submitted multiple proposals to develop Parcel 9032. App. A at 6. The City rejected each and every proposal under its new critical areas ordinance. *Id.* Because the 83 square feet (not even the size of a small bedroom) of developable land is far too small for any viable economic use, Kinderace applied for a RUE (App. A at 6), which authorizes the City to reduce the size of critical area buffers in order to allow a reasonable use of the property. *See* SMC 21A.50.070(2). Kinderace initially sought approval for an Ace Hardware—a project that had substantial community support and cost more than $100,000 in pre-development expenditures. CP 4:16-18. The City resisted the proposal, so Kinderace scaled back and proposed a much smaller Pagliacci Pizza. CP 1780.

The RUE application included a detailed economic analysis to show that the pizza restaurant represented the minimum financially feasible project. CP 1810 (citing AR 684-693). Being sensitive to environmental concerns, the site plan was designed to minimize environmental impacts by avoiding any disturbance to the on-site stream and wetland, and to maintain a minimum 25-foot buffer from the stream (the required buffer when Severson purchased the lot). CP 1916. The total site disturbance would only be 36 percent. CP 1916, 1917. The City's environmental expert indicated that any buffer impacts could be mitigated, concluding that "[t]here are a variety of approaches that could be taken that could constitute compensatory mitigation for the proposed impacts." CP 895. Regardless, the City denied the application upon its conclusion that the detention pond north of the creek on the pre-2008 configuration of Parcel 9032 had provided a "reasonable use" of the commercial zoned property, precluding any further use. In reaching its decision, the City refused to consider the current, post-boundary line configuration of Parcel 9032—the legal configuration of the lot at the time Kinderace filed its application.

C. Lower Courts Denied Kinderace's Regulatory Takings Claim, Concluding That Kinderace Had Received Sufficient Value from the Adjacent Parcel

After the City denied the RUE, Kinderace filed a lawsuit seeking compensation for a total regulatory taking under binding precedents from this Court and the U.S. Supreme Court holding the government per se liable for a taking when it applies a regulation in a manner that denies the landowner all economically beneficial use of the property.[3] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); *Guimont v. Clarke*, 121 Wn.2d 586, 600, 854 P.2d 1 (1993). The trial court dismissed Kinderace's claim on summary judgment. App. A at 7.

Division I of the Court of Appeals affirmed the trial court's opinion, concluding that the relevant parcel for the regulatory takings analysis was not the current, lawful configuration of Parcel 9032—which was unquestionably denied all use. App. A at 8-10. Instead, the Court of Appeals aggregated the development rights in Parcel 9058 with Parcel 9032 to hold that the City's denial of the RUE application did not deprive Kinderace of all economically viable use of the land. *Id.* The court refused to give any significance to the fact that, prior to denying all of Kinderace's proposals, the City had approved a boundary line adjustment which appended the stormwater detention facility

[3] Kinderace also filed a land use appeal under the Land Use Petition Act. That petition is not at issue in this appeal. *See* App. A at 1 n.1, 12-13.

(and the land it was located on) to the adjacent parcel, creating the current, undeveloped configuration of Parcel 9032. App. A at 9. Nor did the court address what rights exist in Parcel 9032, which remains undeveloped commercial property. *Id.* Nor did the court even address the fact that the detention pond was required by the City's critical areas ordinance. *Id.* Kinderace moved for reconsideration, which the Court denied. App. B.

REASONS FOR GRANTING THE PETITION

In the published decision below, the Court of Appeals held that contiguous parcels that share some degree of common ownership must be combined for purposes of considering whether regulatory action has resulted in a taking. App. A at 8-10. The lower court cited no authority for its decision to aggregate an owner's interest in an adjacent parcel when determining the relevant parcel—indeed, there is no such authority in Washington or U.S. Supreme Court case law. Thus, the Court of Appeals adopted a rule of constitutional law that conflicts with opinions of this Court and the U.S. Supreme Court, as well as other Court of Appeals decisions, warranting review under the standards set out by RAP 13.4(b)(1)-(2). Moreover, the rule applied below is subject to a nationwide split of authority and is currently pending review by the U.S. Supreme Court in *Murr v. State of Wisconsin*, Dkt. No. 15-214. Review is necessary to resolve this important

question of constitutional law and to ensure that Washington's approach to the relevant parcel question does not fall out of step with the U.S. Supreme Court's directions in regard to this critical inquiry. *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987) ("the federal constitution sets a minimum floor of protection, below which state law may not go"). At the very least, this Court should grant and hold the case pending the U.S. Supreme Court's decision in *Murr*, which will be issued before the end of the Court's 2016 term.

A. The Lower Courts' Consideration of Development on an Adjacent Lot When Determining the Relevant Parcel Presents a Critical and Unresolved Issue of Takings Law

The Court of Appeals' decision to aggregate all of the development rights that an owner may have in adjoining parcels with the impaired rights on the subject property embraces a version of the relevant parcel rule that has never been endorsed by this Court or the U.S. Supreme Court. *Presbytery*, 114 Wn.2d at 334; *Penn Central*, 438 U.S. at 130-31. As explained by *Presbytery* and *Penn Central*, the relevant parcel rule holds that takings law does not divide a single parcel into discrete segments in order to determine whether rights in any particular segment have been abrogated. *Id.* Those cases, and their progeny, focus only on the host of rights inherent in a single parcel, referred to as the "parcel as a whole," when determining the relevant

parcel. *Id.* Indeed, the U.S. Supreme Court, in *Penn Central*, refused to follow a New York rule that allowed courts to aggregate an owner's other property investments,[4] and later criticized the aggregative approach as "extreme" and "unsupportable" in *Lucas*, 505 U.S. at 1016 n.7.

Nonetheless, there is a longstanding nationwide split of authority on whether courts should aggregate an owner's other real estate interests when determining the relevant parcel. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (noting "the difficult, persisting question of what is the proper denominator in the takings fraction"). Some courts allow the government to aggregate all contiguous property under common ownership in order to reach the largest possible denomimator (thereby diluting the economic impact and diminishing the possibility that even the most extreme regulation of property will effect a compensable taking). *See, e.g.*, *Bevan v. Brandon Township*, 438 Mich. 385, 475 N.W.2d 37, 43 (1991) (despite division into separate, identifiable lots, the court ruled that "contiguous lots under the same ownership are to be considered as a whole"); *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720, 857 N.E.2d 451, 458 (2006) ("We conclude that the extent

[4] 438 U.S. at 121-22. In determining the relevant parcel, *Penn Central* refused to consider the owner's other real estate holdings and instead focused the takings analysis on the single subject parcel itself. *Id.* at 130, 136-38.

of contiguous commonly owned property gives rise to a rebuttable presumption defining the relevant parcel.").

Other courts limit the relevant parcel inquiry to the lot impacted by the regulatory decision. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) ("Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified."); *American Savings & Loan Association v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (contiguously owned parcels not presumptively aggregated); *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006) (reversing trial court decision that aggregated two contiguous parcels); *State ex rel. R.T.G., Inc. v. Ohio*, 98 Ohio St. 1, 12, 780 N.E.2d 998 (2002) (approximately 100 acres outside of the regulated area was not included in the relevant parcel even though it was contiguous and commonly owned).

Historically, Washington courts have adhered to the single parcel approach. *See Presbytery*, 114 Wn.2d at 334; *see also Peste v. Mason Cty.*, 133 Wn. App. 456, 473, 136 P.3d 140 (2006). But, with the published decision below, Washington courts have now taken an inconsistent position on the relevant parcel issue.

There can be no reasonable debate whether the relevant parcel question raises an important issue of constitutional law. According to the U.S. Supreme Court, determination of the relevant parcel is a "critical question[]" in the takings analysis.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the **critical questions** is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 496, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added)). Indeed, in many cases, "the definition of the relevant parcel of land is a **crucial antecedent** that determines the extent of the economic impact wrought by the regulation." *Lost Tree Village Corporation v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (emphasis added).

The decision below provides a stark illustration of how important the relevant parcel determination is to a regulatory takings claim. The City did not dispute that it denied all proposals to develop Parcel 9032 in its current configuration. Thus, if the relevant parcel in this case is the post-boundary line adjustment configuration of the lot, then the City's application of its

critical areas ordinance unquestionably deprived the owner of all economically viable use. If, however, the relevant parcel includes land transferred to the adjacent parcel years before the City applied its critical areas ordinance to prohibit all use, then the City's denial may not have deprived the owner of all value in the land. Inconsistency in the relevant parcel determination will result in inconsistent results and uncertainty for both landowners and government alike. *See Lucas*, 505 U.S. at 1016 n.7. Review of this issue is both warranted and necessary.

B. The Court's Refusal To Consider the Inherent Value of Parcel 9032 at the Time the Regulation was Applied Undermines the Purpose of the Regulatory Takings Doctrine

There is no question that the City's application of its critical areas ordinance denied all use of Parcel 9032 in its current configuration. According to binding precedents from this Court and the U.S. Supreme Court, the government is per se liable for a taking when it applies a regulation in a manner that denies the landowner all economically beneficial use of the property. *Lucas*, 505 U.S. at 1015; *Guimont*, 121 Wn.2d at 600. The lower court's aggregative approach to determining the relevant parcel, however, allowed the court to rule that there had been no taking without ever determining the value of Parcel 9032 (which is taxed for its value as undeveloped commercial property)—let alone evaluating the impact of the

regulations. That approach frustrates the purpose of regulatory takings law, which is intended to determine "the actual burden imposed on property rights, [] how that burden is allocated, [or] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

The aggregative approach is also contrary to the understanding that property, by its very nature, is assumed to have value. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949) ("Since land and buildings are assumed to have some transferable value, when a claimant for just compensation for their taking proves that he was their owner, that proof is *ipso facto* proof that he is entitled to some compensation."). Indeed, the right to build on one's property is a fundamental and valuable attribute of property ownership. *Norco Const., Inc. v. King Cty.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982) ("The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit."); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 73 L. Ed. 210 (1928) (One of the defining characteristics of property ownership is the right to make reasonable use of one's land.). Even land designated for the preservation of

environmentally sensitive areas has inherent value. *See* RCW 64.04.130 (conservation buffers constitute valuable real property); *see also Klickitat County v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5-6 (Bd. Tax App., June 12, 2002) (buffer area constitutes property; the holder of the conservation interest must pay property taxes). Takings law, therefore, demands that the courts identify "**the present value of the regulated property** and the value of the property before imposition of the regulation to determine whether the regulation has diminished the economic uses of the land to such an extent that an unconstitutional taking has occurred." *Peste*, 133 Wn. App. at 473 (emphasis added).

The only justification offered by the Court of Appeals for its decision to focus its takings analysis on the pre-boundary line adjustment configuration of Parcel 9032 was that those were the circumstances on the ground when the City updated its critical areas ordinance. App. A at 8-10. But, as a matter of black-letter law, the date an ordinance is adopted has no bearing on the rights inherent in one's property. *See Palazzolo*, 533 U.S. at 627; *see also Lucas*, 505 U.S. at 1015 (holding that the South Carolina Coastal Council had taken an owner's right to build homes on lots zoned for residential development when the council adopted a law imposing a mandatory coastal buffer so large that it totally enveloped both lots). Indeed,

the very suggestion that a City can alter an individual's rights in his or her property is contrary to one of the most basic tenets of the Takings Clause: "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Palazzolo*, 533 U.S. at 628 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980)). Simply put, a property owner must be allowed to challenge the imposition of a land use regulation based on the value of his or her property at the time the regulation is applied to the land. *Palazzolo*, 533 U.S. at 628; *Peste*, 133 Wn. App. at 473. Here, the City applied its critical areas ordinance to deny all use of Kinderace's property when it denied the RUE in 2013. That is the date for determining the "present value of the regulated property." *See Peste*, 133 Wn. App. at 473.

C. Public Policy Demands That The Relevant Parcel Inquiry Take Into Account Questions of Timing and Investment Expectations

The configuration of any given parcel of property may change over time—particularly in areas like the Puget Sound region where developable lands are limited and the population continues to grow. It is common for both residential and commercial development to occur in phases. Typically, lots are developed and sold in order to fund further development in a process that can last years. *See* Daisy L. Kone, *Land Development,* 144-60 (10th Ed. 2006). As lots are sold, the developer does not typically retain an ownership

interest in all of the land, and his economic expectations with regard to the first phase of the development is considered complete. *Id.* at 217. But it is common for a developer to retain an interest in individual parcels for future development long after a phase has been completed. *Id.* Thus, although a developer may hold an interest in several adjacent properties over the course of the entire project, those interests will be temporally severed as phases are completed. They will also be severed by different investment expectations.

Other courts faced with this type of ownership/development will typically take the timing of events into account when determining the relevant parcel. In this regard, the Federal Circuit explained that "[t]he timing of the property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor to be considered." *Palm Beach Isles Assocs.*, 208 F.3d at 1381. Importantly, those courts hold that it is the owner's expectations at the time of acquisition—not the government's—that shapes the relevant parcel. *Forest Prop., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (Court should focus "on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property."). Without consideration of those essential factors, the aggregative approach adopted in

the decision below would only operate to deprive developers of the protections guaranteed by the Takings Clause by always exaggerating the denominator in the takings calculus. Such a rule would harm the public's interest in new development, which is absolutely essential in the fight against the skyrocketing cost of housing in our region.

CONCLUSION

Defining the relevant parcel based solely on contiguous common ownership may be an easy way to resolve the relevant parcel question, but it does little to serve the policies underlying the Takings Clause and is blind to the realities of phased development. A relevant parcel analysis must take full account of the timing, the owner's investment expectations, and economic realities when land development is involved. Review is necessary and warranted to promote uniformity in our case law and to ensure against the erosion of the Takings Clause.

DATED: September 19, 2016.

Respectfully submitted,

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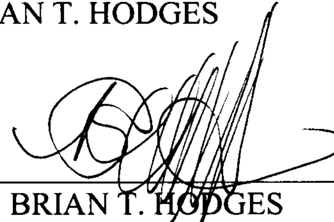
By 
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APPENDIX A

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

KINDERACE LLC, a Washington limited liability company, Appellant,	)	No. 73409-1-I
v.	)	DIVISION ONE
CITY OF SAMMAMISH, a Washington municipal corporation, Respondent.	)	PUBLISHED OPINION FILED: July 5, 2016

SPEARMAN, J. — By means of a boundary line adjustment, Kinderace LLC (Kinderace) created a new 32,850 square foot parcel of which all but 83 square feet had been designated by the City of Sammamish (City) as environmentally critical areas and buffers. The City denied Kinderace's request for a reasonable use exception that would have allowed it to proceed with a proposed development project on the new parcel. Kinderace brought a regulatory takings claim against the City, alleging that the denial deprived it of all economically viable use of the parcel. The trial court dismissed Kinderace's claim, finding that it had received reasonable beneficial use of the property as part of a joint development with an adjoining parcel. Kinderace appeals.[1] Finding no error, we affirm.

[1] Kinderace also assigned error to the trial court's dismissal of its Land Use Petition Act (LUPA) claim, but because it makes no argument in support of that claim, we conclude its appeal of that issue has been abandoned. Allen v. Asbestos Corp., Ltd.,138 Wn. App. 564, 582, n.5, 157 P.3d 406 (2007) (citing Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (where no argument is presented in appellant's opening or reply brief, we consider the assignment of error abandoned.)

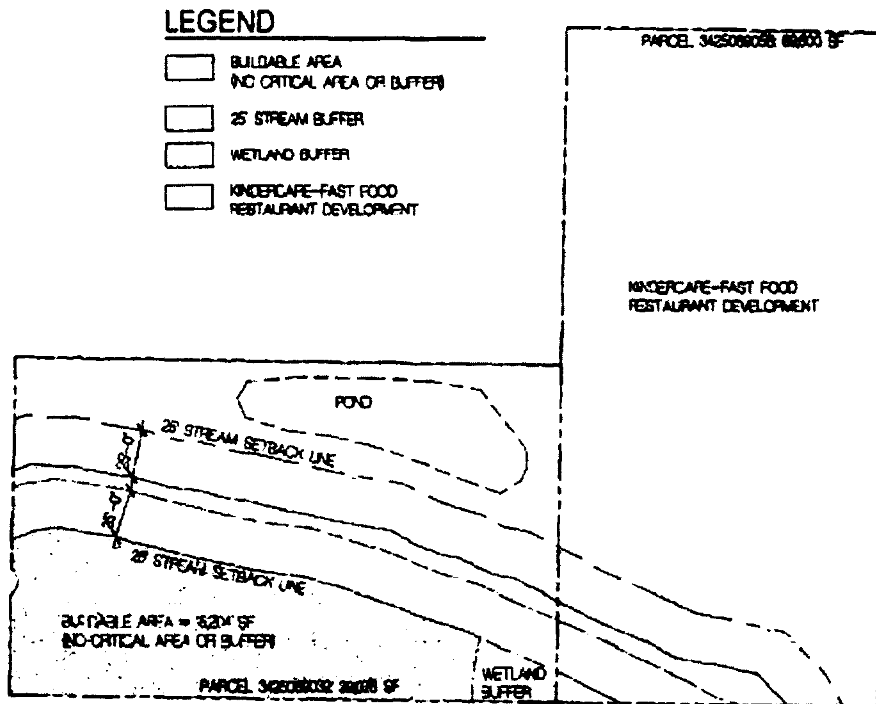
FACTS

This dispute concerns a parcel of land located in Sammamish, Washington, near the east side of 228th Avenue NE. In 1995, four owners of adjacent parcels -- Parcel 9032, Parcel 9058, Parcel 9053, and Parcel 9039, sought a rezone of their properties for commercial development. The rezone was granted and the owners worked with developers Elliot Severson and Ed and Mark Roberts (who later became Lynn LLC and SR Development, LLC), to prepare and submit plans for joint development.

In 2001, Lynn LLC submitted permit applications for Phase 1 of a "Plateau Professional Center," which would consist of a Starbucks and a medical office building on Parcel 9039. Clerk's Papers (CP) at 75. The permit was issued on November 12, 2002. In August and September of 2003, SR Development applied for a permit for the joint development of Parcel 9058 and 9032 as part of Phase 2. A Kentucky Fried Chicken/Taco Bell restaurant and a Kindercare daycare facility were to be built on Parcel 9058. Parcel 9032 was intended for use as a storm water detention pond.

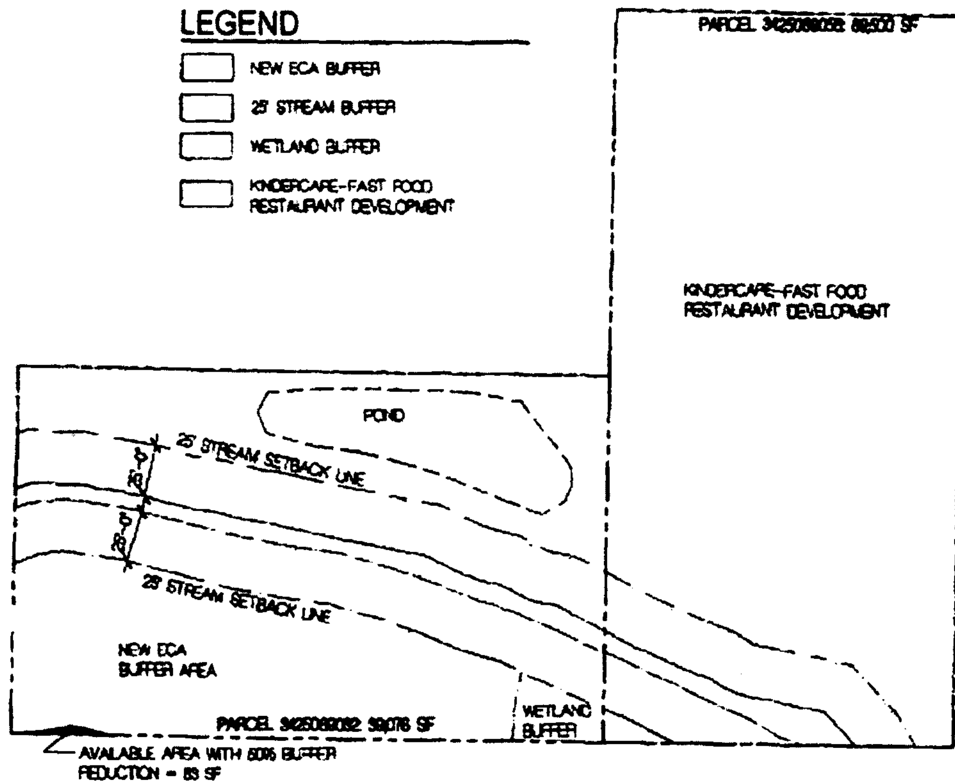
SR Development also applied for a variance from the strict application of the 150-foot wetland buffer requirement, insisting that the site could not be developed without it. After much discussion, the City approved the development permit and variance for the three parcels on July 9, 2004. The detention pond to be located north of the creek on Parcel 9032 was critical to allowing Parcel 9058 to be developed as extensively as proposed in Phase 2.

The Plateau Professional Center was completed in July 2005. The diagram below represents the division and character of the area consisting of Parcels 9032 and 9058 at that time.



CP at 1142.

On December 20, 2005, the Sammamish City Council adopted an ordinance regarding environmentally critical areas that increased the buffer requirements for bogs and streams. At that time, Parcel 9032 was bifurcated by George Davis Creek, which had been newly designated as a stream of significance subject to a 150-foot buffer requirement. The ordinance also resulted in the south portion of Parcel 9032 being designated as a buffer area and not subject to development without buffer modification or a reasonable use exception (RUE). SMC 21A.50.070(2)(a)(i). The diagram below shows the newly designated buffer area south of George Davis Creek on Parcel 9032.



CP at 1143.

In 2006, Parcel 9058 was sold for $3,815,000. The record shows that development and the substantial sale price were made possible by the ability to locate the storm water detention pond on Parcel 9032.[2] Severson met with City officials in August 2006 to discuss developing the remainder of Parcel 9032 as a parking lot. CP 622-624. During that meeting, the City expressed that the parcel did not satisfy the criteria for a RUE because it was already being used as a storm water detention facility.

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[2] Mr. Severson testified as follows before the hearing examiner:

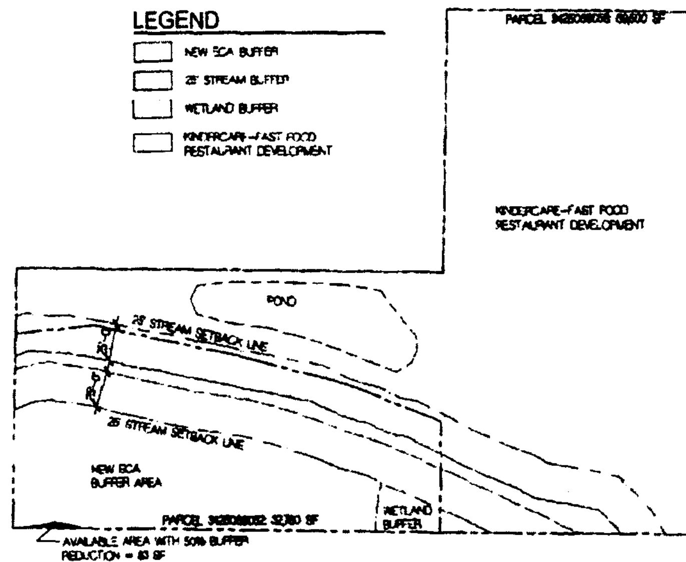
> And ultimately we made a deal to really save our investment in 9058, because we'd had so much money sunk into 9058 that the only way we could make that work was if we could get two uses on 9058. And the only way we could do that is if the detention pond was not located on 9058 but was elsewhere. And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

CP at 1448.

The Plateau Professional Center would be considered a reasonable use for all of the parcels involved in the joint development, including Parcels 9032 and 9058. Id.

In 2007 and 2008, SR Development applied for two boundary line adjustments that modified the boundaries of Parcel 9032, placing the detention pond onto Parcel 9058. By design, new Parcel 9032 was completely constrained by stream, wetlands, and buffers. The boundary line adjustments were approved and the notices contained an "Approval Note" which stated that "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 at 530-532; 542-544.

On January 21, 2009, the line adjustments were recorded, along with a warranty deed transferring a portion of old Parcel 9032 to the owner of Parcel 9058. CP 534-537. The results of the two boundary line adjustments can be seen in the diagram below. New Parcel 9032 no longer contains the storm water detention pond but only extends as far as the stream setback line to the north.



CP at 1144.

SR Development appealed the assessed value of new Parcel 9032 and the value was reduced from $198,600 to $50,000. SR Development conveyed new Parcel 9032 to Kinderace LLC, on September 12, 2012. Kinderace consists of one member, Camtiney, LLC, whose members include Severson and his family.

Kinderace applied for a RUE in 2013 and initially sought approval for an ACE Hardware store, but chose to scale back and propose a Pagliacci Pizza restaurant. Kinderace contended that it had been denied all reasonable use of new Parcel 9032 as it was presently situated.

The City denied the RUE application, finding that new Parcel 9032 "ha[d] already been extensively developed with multiple commercial reasonable uses" by SR Development "a corporate alter ego" of Kinderace. CP at 71. As a result, the application of the ordinances did not deny all reasonable use of the property. Id. Kinderace appealed the City's decision to the hearing examiner. The appeal was denied, with the hearing examiner finding that

> [a] more than reasonable use had been obtained when Parcels 9058 and 9032 were jointly developed. 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 at 1793-1794.

Kinderace brought a LUPA action in superior court challenging the hearing examiner's decision and also filed a separate complaint, alleging that new Parcel 9032 had been subjected to a regulatory taking. The two actions were consolidated.

The trial court dismissed Kinderace's LUPA action, finding that it had failed to meet its statutory burden to establish satisfaction of the criteria for relief. The parties disputed whether the dismissal of the LUPA claim dispensed with Kinderace's regulatory takings claim. The City filed for a motion summary judgment and Kinderace filed a motion for partial summary judgment. The trial court granted the City's motion and denied Kinderace's cross-motion, finding that Kinderace had achieved reasonable beneficial use of Parcel 9032, in both the old and new configurations, as part of the joint development with Parcel 9058. Kinderace appeals.

DISCUSSION

We review an order granting summary judgment de novo. Briggs v. Nova Servs., 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c).

The United States Constitution, U.S. Const. amend. 5, provides in relevant part, "nor shall private property be taken for public use, without just compensation." Similarly, Washington Const. art. 1, § 16, provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made ...." In Washington, a land use regulation which too drastically curtails an owner's use of his or her own property can cause a constitutional "'taking.'" Presbytery of Seattle v. King Cty, 114 Wn.2d 320, 329, 787 P.2d 907 (1990). In a regulatory takings claim, one threshold issue 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 make

some economically viable use of the property. Kahuna Land Co. v. Spokane Cty., 94 Wn. App. 836, 841, 974 P.2d 1249 (1999). The landowner has the burden of showing that the mere enactment of a regulation constitutes a taking. Guimont v. Clarke, 121 Wn.2d 586, 601-02, 854 P.2d 1 (1993).

Kinderace contends the trial court erred when it granted the City's summary judgment motion and denied its motion for partial summary judgment. It argues that the undisputed evidence shows that the City's environmental regulations deprived it of all economically viable use of new Parcel 9032. Kinderace claims the trial court erred when it concluded that Kinderace had achieved reasonable beneficial use of the new parcel as part of its joint economic development of the old parcel. According to Kinderace, the error arises from the trial court's failure to treat new Parcel 9032 as a new legal lot that "carries all the fundamental attributes of property ownership." Br. of Appellant at 12.

Kinderace argues that under RCW 58.17.040(6), the City's approval of the boundary line adjustment, which created new Parcel 9032, established its right to develop the lot irrespective of any prior development associated with old Parcel 9032. Kinderace's argument turns on its interpretation of RCW 58.17.040(6). That statute provides:

> 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 nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site;

Under its reading of the statute, Kinderace argues the City's approval of the boundary line adjustment accomplished two things. First, it created new Parcel 9032 as "a new legal lot that carries with it the right to some economically viable use." Br. of Appellant at

13. And second, it "necessarily determined that the proposed new Parcel 9032 would qualify as a building site." Appellant Reply Br. at 10-11. As a result, according to Kinderace, it now has a right to develop new Parcel 9032, separate and distinct from any benefit derived from the prior joint development associated with old Parcel 9032 and the City is bound by its determination that the new parcel is a "building site." Appellant Reply Br. at 12.

In support of the first proposition, Kinderace relies primarily on City of Seattle v. Crispin, 149 Wn.2d 896, 71 P.3d 208 (2003). But the case is inapposite because it does not discuss the issue of development rights associated with a new parcel created by a boundary line adjustment. The issue there was simply "whether the division of land that created [a new] tax lot ... qualified as a boundary line adjustment for purposes of the exemption from the subdivision statutes as set forth in RCW 58.17.040(6)." Crispin, 149 Wn.2d at 902. The court held that as long as a boundary line adjustment did not create an additional lot, it was within the statutory exemption. Id. at 904. The opinion does not address the proposition Kinderace asserts here. Accordingly, we reject the argument because it is not supported by relevant authority.

Furthermore, the undisputed facts do not support Kinderace's claim that the City's environmental regulations deprived it of all economically viable use. As the trial court noted, Kinderace does not appear to dispute that at the time the City adopted the relevant environmental regulations, old Parcel 9032 had already been fully developed as part of the Plateau Professional Center. Indeed, the record shows that but for the use of that parcel for the storm drainage pond, the profitable development of the center would not have been possible. Nonetheless, Kinderace seems to argue that, having

redrawn the boundaries of old Parcel 9032 to exclude the drainage pond and to encompass a specific area that is almost completely encumbered by significant environmental regulations, it is entitled to either a RUE or to be compensated again. We disagree.

In determining whether Kinderace had derived an economic use of new Parcel 9032, the trial court properly considered the configuration of the parcel at the time the regulations were enacted. To hold otherwise would enable a property owner to subvert the environmental regulations by changing parcel boundaries to consolidate critical areas. Once an owner had delineated a parcel that was entirely constrained, he or she could claim deprivation of all economically viable use. Here, SR Development instituted the boundary line adjustment, specifically carving out the parts of old Parcel 9032 to contain only the environmentally critical areas, and conveyed the property to Severson's new entity, Kinderace. The area of new Parcel 9032 had already been developed as part of the joint development of Plateau Professional Center. We reject the argument that Kinderace can use a boundary line adjustment to isolate the portion of its already-developed property that is entirely constrained by critical areas and buffers, and then claim that the regulations have deprived that portion of all economically viable use.

Next, Kinderace argues that the City's approval of the boundary line adjustment established that new Parcel 9032 was a "building site" and therefore approved it for potential development. Under RCW 58.17.040(6), a boundary line adjustment cannot "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." Because the statute does not define the term "building site," the applicable definition is

established by local ordinance, here, SMC 19A.04.060.[3] Under that ordinance, "building site" is defined as an area of land either (1) "[c]apable 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;" or (2) "[c]urrently legally developed."

Kinderace relies on Mason v. King County, 134 Wn. App. 806, 808-809, 142 P.3d 637 (2006), which held that "RCW 58.17.040(6) does not permit a local jurisdiction to approve a boundary line adjustment application that would transform a legally created lot into a substandard, undersized lot." But Kinderace does not argue that new Parcel 9032 is either substandard or undersized. Instead, relying solely on the first definition of "building site" listed in SMC 19A.04.060, Kinderace argues that in approving the boundary line adjustment, the City "necessarily" determined that new Parcel 9032 was a lot capable of being developed. Appellant Reply Br. at 10.

The argument is not well taken. First, as the City points out, even if it had determined that the proposed new Parcel 9032 was not developable without an exception for reasonable use, it still could not have denied Kinderace's boundary line adjustment application when it met all of the requirements. Cox v. City of Lynnwood, 72 Wn. App. 1, 7-8, 863 P.2d 578 (1993) (city may not look beyond whether the individual application complies with its ordinance to justify denial of the boundary line adjustment). The application satisfied RCW 58.17.040(6) because it did not create any additional lots. And it qualified as a building site under SMC 19A.04.060(2) because at the time of

[3] "[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." Mason v. King Cty., 134 Wn. App. at 811.

the boundary line adjustment, it was an area of land "[c]urrently legally developed" as part of the Plateau Professional Center. SMC 19A.04.060(2). Under these circumstances, the argument that the approval was a determination that the site is developable is untenable. This is especially so in light of the express statement in the notice of approval that "[i]t Does Not Guarantee the Lots Will be Suitable for Development Now or in the Future."[4] CP 530-32; 542-44.

We conclude that the trial court did not err when it granted the City's motion for summary judgment and denied Kinderace's motion for partial summary judgment.

The City asks for fees under RCW 4.84.370. The statute provides that:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

[4] Similarly, Kinderace's argument that it expended significant resources on developing proposed uses for new Parcel 9032 in reliance on the finality of the City's approval of the boundary line adjustment is unavailing. Appellant's Reply Br. at 13-14. At issue in this case is whether approval of the boundary line adjustment was also a determination that the lot was developable. The finality of the boundary line adjustment is not in dispute.

Here, the statute does not apply because there is no appeal of a decision to issue, condition, or deny any development permit or similar land use approval or decision. Kinderace appealed only the trial court's dismissal of its regulatory takings claim; it did not appeal the dismissal of its LUPA claims. We therefore decline to award fees under RCW 4.84.370.[5]

Affirmed.

Spearman, J.

WE CONCUR:

Leach, J.

Cox, J.

[5] Because we affirm the trial court's dismissal of Kinderace's claim, we also deny its request for fees under RCW 8.25.075.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KINDERACE LLC, a Washington limited liability company, Appellant, v. CITY OF SAMMAMISH, a Washington municipal corporation, Respondent.	)	No. 73409-1-I DIVISION ONE ORDER DENYING APPELLANT'S AND RESPONDENT'S MOTIONS FOR RECONSIDERATION

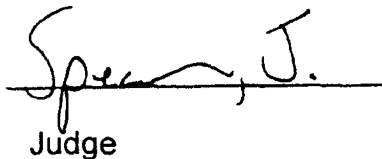
Appellant, Kinderace, LLC and Respondent, City of Sammamish filed motions for reconsideration of the opinion filed in the above matter on July 5, 2016. The court called for answers and the parties filed their answers to the motion.

The court has determined that both parties' motions for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's and respondent's motion for reconsideration of the opinion filed on July 5, 2016, are denied.

DATED this 22nd day of AUGUST, 2016.

FOR THE COURT:



Judge

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

Supreme Court No. ________

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

2016 SEP 19 PM 3:25
COURT OF APPEALS DIV I
STATE OF WASHINGTON

KINDERACE, LLC,
a Washington limited liability corporation,

Petitioner,

v.

CITY OF SAMMAMISH,
a Washington municipal corporation,

Respondent.

On Petition for Review from Division One,
Washington State Court of Appeals, No. 73409-1-I

DECLARATION OF SERVICE

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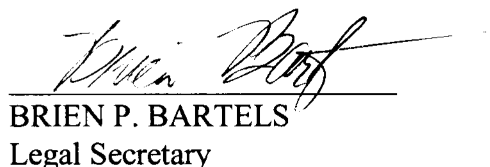
DECLARATION OF SERVICE

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 September 19, 2016, I caused a true copy of the foregoing PETITION FOR REVIEW to be served on the following persons via First-Class Mail:

Michael R. Kenyon
Charlotte A. Archer
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 19-16 day of September, 2016, at Bellevue, Washington.



BRIEN P. BARTELS
Legal Secretary