

NO. 40717-5-II

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

KARL J. THUN and VIRGINIA THUN, husband and wife; THOMAS
PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND
LOUISE LESLIE FAMILY REVOCABLE TRUST,

Appellants,

v.

CITY OF BONNEY LAKE, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT CITY OF BONNEY LAKE

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STATE OF WASHINGTON
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DIVISION II

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I. INTRODUCTION

The City of Bonney Lake respectfully requests that this Court uphold the trial court's summary dismissal of the Appellants' inverse condemnation case. Appellants allege that the City's 2005 area-wide rezone of 235 acres to Residential/Conservation (RC-5), which included approximately 30 of their 36 acres, "took" their property without just compensation in violation of the Washington Constitution.¹ Because the Appellants have never pursued development approvals under the current regulations, they have failed to exhaust their administrative remedies and their case is not ripe for review.²

Appellants do not contend that they cannot build anything on the Property; in fact, they admit the RC-5 zoning, which caps residential densities at one unit per five acres, would allow them to construct six homes. Rather, Appellants contend that the rezone thwarted their plans to construct a 575-unit condominium project, thereby rendering the Property economically

¹ Ordinance No. 1160, which effectuated the rezone, is at CP 286-88. The Thun and Leslie Properties are areas 18 and 19 on CP 288. CP 268-69 is a map created by the City's planning staff, showing the location of all the properties in the rezone area and how they are currently zoned. The CP version is in black and white. A color version is attached as Appendix A to this Brief.

² The courts speak of "ripeness" and "exhaustion of administrative remedies" interchangeably, not clarifying how exactly the doctrines fit together. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 75, 768 P.2d 462 (1989) ("We have implicitly recognized that exhaustion and ripeness are related concepts in the land use area."). Logically, it appears correct to say that exhaustion is the process by which a takings claim becomes ripe.

infeasible to develop.³ Appellants make this incredible assertion despite the fact that they have never even tried to develop under the current regulations.

This is a classic example of the kind of case in which courts have required property owners to exhaust administrative remedies. The trial court correctly observed that the Property is still developable; the failure of the condominium project did not necessarily mean that the City “took” the Property. The court stated:

[T]he issues seem to hinge on, from my point of view, does the plaintiff have an absolute right to develop the 500-plus condominium project on this particular piece of property? I think that was decided before, saying no Doesn't the plaintiff need to go back to the drawing board and figure out what else you can do with the property, as opposed to saying, well, it's just a takings at this point?

VRP at 4. The Appellants have never pursued land use approvals under the existing regulations, nor have they any evidence that such efforts would be futile. The trial court properly found, as a matter of law, that the case is not ripe for adjudication. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (1989); *Sintra v. City of Seattle*, 119 Wn.2d 1, 19, 829 P.2d 765 (1992).

³ Appellants allege that, prior to the rezone, the Property was worth \$7,920,000, the amount Reich Land Company, working through the agent Abbey Road Group, had agreed to pay for the Property if the 575 unit condominium project was approved. Appellants claim to have lost the entire \$7.92 million in value. CP 386 (“[Damages] are all due to losing our sale to Reich Land Company and being left with a property which would cost more to develop than it is worth.”).

II. COUNTER STATEMENT OF THE CASE

A. Procedural history

This is the third unsuccessful lawsuit the Appellants have filed against the City for the 2005 rezone that changed the zoning of some of their acreage from Commercial (C-2) to Residential/Conservation (RC-5). The rezone was a legislative decision by the City Council that affected 235 acres on the western border of the city, where the Bonney Lake Plateau descends into the Puyallup River Valley. CP 268-69, 286-88. Property in the rezone area was formerly zoned either C-2 or single-family residential (R-1). *Id.*⁴ The rezone changed approximately 30 out of 36 acres of Appellants' Property from C-2 to RC-5; the remaining acreage is still C-2.⁵

The primary impetus behind the rezone was to make the zoning consistent with the City's Comprehensive Plan, which had designated the City's entire western slope as "Conservation" for many years. CP 286-87. In

⁴ Appellants' assertion that the rezone "only applied to Thun and Leslie" is false. Brief at 11. On its face, the ordinance changes the zoning of numerous parcels in addition to Appellants'. Although other property owners, including Shipman, Tracy, Manke, and Spiketon, filed vested development applications in time to avoid the rezone, all these developments have either failed or stalled because of the difficulty in constructing roads and utilities on the steep slopes. CP 263. Any vested development that fails to build out will lose its vesting and become subject to the RC-5 zoning. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986).

⁵ The exact size of the C-2 portion has yet to be determined. The City arrived at a rough estimate of seven acres by using the scale provided on the zoning map. CP 564. Geographic Information Systems data indicates that the C-2 piece is 5.88 acres. Neither is a precise measurement. Because the zoning splits the triangular-shaped parcel belonging to Thun, there is no existing parcel line to follow.

addition, the City Council sought to “supplement the critical areas code in managing areas that are steep and prone to geologic instability.” *Id.*

Appellants insinuate that the City’s concern about steep slopes was pretextual. However, the record contains extensive references to the geologic instability of the City’s western slope, and expresses the fear that the area would slide if developed at significant densities. *See, e.g.*, CP 262-63, 274, 280, 286-87. Unfortunately, the City’s fears have come true. Parts of the hillside that were authorized for development prior to the 2005 rezone are experiencing slope failures today. *See* CP 551-554.

In 2005, the Appellants challenged the rezone before the Growth Management Hearings Board (GMHB).⁶ In that appeal, they alleged that the rezone violated the Growth Management Act because a maximum of one dwelling unit per five acres is not acceptable urban density. CP 372. They also contended that the City’s desire to protect steep slopes did not justify low density zoning. CP 370. The GMHB rejected the appeal and upheld the rezone, finding as follows:

The City of Bonney Lake has clearly based its land use decisions regarding the western slopes of the City on environmental factors – an extensive area making up much of the City boundary laced with steep slopes and landslide

⁶ The GMHB had jurisdiction over the appeal because the rezone was an area-wide legislative decision, not a site-specific quasi-judicial decision, which would have been subject to appeal under the Land Use Petition Act (LUPA), RCW 36.70C.

hazards. . . . There is also significant rationale for the choice of the City to adopt the rezone, it was a reasoned decision.⁷

CP 374. The Appellants did not appeal the GMHB's order.

The Appellants' second lawsuit over the rezone was an RCW 36.70C Land Use Petition. In it, they challenged the City Hearing Examiner's decision that the 575 unit condominium project they had proposed for the Property, "Sky Ridge," did not vest in the C-2 zoning. On appeal, this Court found that Sky Ridge did not vest because the Appellants' agent, Abbey Road Group, failed to submit a complete application for a building permit prior to the rezone taking effect. *Abbey Road Group v. City of Bonney Lake*, 141 Wn. App. 184, 167 P.3d 1213 (2007). The Supreme Court upheld this Court's decision, stating:

[Abbey Road chose] to obtain site development approval before undertaking the additional step of filing a building permit application. While this may make good business sense, as building plans may change significantly depending on final site plan approval, by the same token it suggests a builder that is not ready to proceed, and thus is not entitled to vesting under the very rationale of that doctrine.

Abbey Road Group v. City of Bonney Lake, 167 Wn.2d 242, 218 P.3d 180, 186 (2009).

⁷ The GMHB also found that the rezone was a necessary step toward compliance with the order the Board had issued a year earlier in *Jensen v. City of Bonney Lake*. CP 375-76. In *Jensen*, the GMHB found that the City's zoning was inconsistent with the land use designations in the City's Comprehensive Plan, and ordered the City to rezone property to achieve consistency. CP 372. The rezone made the zoning and Comprehensive Plan consistent, as ordered by *Jensen*. *Id.*

In March of 2008, while *Abbey Road* was still pending in the Supreme Court, the Appellants filed the instant lawsuit. Concerned that the Supreme Court's decision could potentially render the lawsuit moot, the trial court issued a stay. CP 235-36. After the Supreme Court ruled against the Appellants in October 2009, the stay was lifted and the case reset on the court calendar.

The City moved for summary judgment, arguing that the case is not ripe for review. The City pointed out that the Appellants had never pursued development approvals under the regulations currently applicable to the Property. The trial court granted summary judgment on April 20, 2010, and denied the Appellants' motion for reconsideration on May 7, 2010. The Plaintiffs appealed.

B. Significant beneficial uses remain in the Appellants' Property

As noted, part of the Appellants' Property is zoned RC-5, and part of it is still zoned C-2. Both zoning designations allow beneficial uses. RC-5 zoning allows, among other uses, single-family residences, accessory dwelling units, schools, churches, parks, licensed child and adult day care homes, home occupations, bed and breakfasts, and various agricultural uses. BLMC 18.20.020-030. Even the Appellants admit the RC-5 portion could support a small development of six homes, which is indisputably a "use."

The RC-5 portion of the Property has attributes that make it suitable for high-end or luxury residential development. The RC-5 designation allows large lots or clustered development retaining large areas of common open space. CP 266. Unlike denser residential and commercial zones in the City, RC-5 properties are not required to “net out” unbuildable areas like steep slopes; therefore, the geologically hazardous areas on the Property could be incorporated into the landscape without sacrificing density. *Id.* Residences in the RC-5 zone can have high-end features like swimming pools, greenhouses, and outdoor fireplaces. BLMC 18.20.030. Because the Property is on a hillside overlooking the Puyallup River Valley, residences could potentially offer views. CP 266.

To utilize the Property more fully, the Appellants could construct a high-density residential or commercial development on the C-2 portion. This portion has frontage on State Route 410 and is situated on a flatter part of the site. CP 262, 268. C-2 zoning allows residential development at a density of up to 20 units per acre. BLMC 18.18.050(B); 18.26.050(F). In addition, the C-2 zone allows uses like nursing and boarding homes, entertainment facilities, restaurants, coffee shops, bakeries, banks, retail, offices, food stores, and medical facilities. See BLMC Chapter 18.26.

The City Code sets unequivocal density caps for both the C-2 and RC-5 zones. BLMC 18.20.050; 18.26.050; 18.18.050. However, simply knowing what densities would be allowed on the Property does not reveal what types of development could or would be constructed because Appellants could choose to utilize their Property in a variety of ways. Until they pursue permits, there is no way to know exactly what could be built.

C. Administrative processes exist for both RC-5 and C-2 uses

The City Code sets forth the administrative processes the Appellants will need to undergo to obtain land use approvals. If the Appellants decided to build homes on the RC-5 piece, they would need to pursue short plat approval. BLMC Chapter 17.44; CP 266. A short plat would divide the Property into individual residential lots, as well as sever the C-2 piece from the RC-5 piece.

The Appellants erroneously characterize short platting as a “perfunctory” process. Brief at 34. Short-platting not only divides property but establishes the critical features of a development, including the location and grade of the access road; how water, sewer, and storm-water must be handled; and whether any measures would need to be taken to protect the critical areas. CP 266-67; BLMC Chapters 17.44 – 17.52. A short plat cannot be approved unless the Planning Director finds that the plat makes “appropriate provisions . . . for the public health, safety and general welfare”

and “the public interest will be served.” BLMC 17.44.035. In other words, the decision to approve a short plat is discretionary, not perfunctory.

To develop the C-2 piece with a commercial or high-density residential use, Appellants would need to pursue building permits, and would have the option of undergoing the voluntary site plan approval process. BLMC Chapter 14.50; BLMC Chapter 14.105; CP 266. Like platting, the building permit process establishes the critical features of the development, such as building heights, parking requirements, access, SEPA mitigation, critical areas mitigation, impact fees, and utilities. CP 267; BLMC 14.105.010 (“Large commercial or multifamily development proposals sometimes require major administrative decisions and interpretations regarding permitted uses, critical areas, access, traffic mitigation, SEPA determination, and other site planning factors. Such administrative actions may be needed before project feasibility can be determined and before building footprints can be identified.”).

If Appellants were to file applications for development approvals that are consistent with the current zoning, the City would process them in accordance with the law. CP 266. A number of discretionary decisions would need to be made in order to approve any proposed developments. *See, e.g.*, BLMC Chapters 16.04 (State Environmental Policy Act); 17.36-17.52 (short

plat); 14.105 (site planning); 16.20 and 16.28 (critical areas); 16.13 (clearing); 16.14 (landscaping); 14.95 (design review).

D. Appellants offer only speculation and inaccurate assertions regarding the economic feasibility of developing the Property with RC-5/C-2 uses⁸

Appellants contend that it would be infeasible to develop the Property with single family homes because the development costs would eclipse the sales prices for the lots. In support of this speculative contention, the Appellants offered an affidavit from their expert, Giles Hulsmann. CP 49-99, 517. Mr. Hulsmann's assumptions defy common sense and are easily rebutted by reference to the City Code. For one thing, he assumed that six residential units are all that could be developed, and included no costs or estimated profit

⁸ The Appellants claim to have offered "undisputed" evidence that it would be economically infeasible to develop the Property under the current zoning. See, e.g., Brief at 7. Appellants' evidence was not "undisputed." In response to a deposition question about whether the RC-5 property would be feasible to develop, City Planning Director John Vodopich stated:

A: [I]t would depend on the product. If they were fairly high end homes and could support the development costs, it may be feasible at a lower density. . . . [W]ith RC-5 zoning you can cluster, you can reduce the . . . infrastructure that [is] needed.

Q: So you believe that when you can only get one residential unit in five acres that's economically feasible to develop a piece of property on that basis?

A: Yes. . . . I have 22 years experience in the state of Washington, a number of which working for counties, and counties quite often have 5, 10, 20 acre zones that are economically feasible for development.

CP 110-11.

from developing the C-2 piece. CP 517. Yet, the City Code authorizes high density residential development on the C-2 portion, and Appellants expressly acknowledge that development costs would be spread over “whatever commercial development could fit on the portion which remained C-2.” Brief at 14.

Second, the expert’s affidavit lacks supporting information about the quality and type of development that would be constructed on the property—that is, whether the six homes would be high-end, low-end, or somewhere in the middle. It is a matter of common sense that the size of the homes, as well as their features and construction quality, would affect the cost to construct as well as the selling price.

Third, the expert omitted many obvious items that would dramatically change his assumptions. The cost estimates contain none of the per unit charges that ratchet up the costs as the size of a development increases. CP 517. Transportation impact fees (BLMC Chapter 19.04), park impact fees (BLMC 19.06), school impact fees (BLMC 19.08), and water and sewer system development charges (BLMC 13.04.070; BLMC 13.12.100) are thousands of dollars per residential unit. A project with 575 units could pay tens of millions for these charges alone, compared with a much smaller outlay for a more modest development. In addition, large projects result in larger transportation

mitigation payments (CP 579), as well as increased building materials and labor costs.

Finally, Appellants' expert did not consider the profound impact of the recent economic down-turn. The fact that the housing market has crashed since 2005 was not lost on the trial court. VRP p. 18, line 17 (in the current market, Sky Ridge "probably would have tanked anyway"). The vastly changed economy is yet another reason to require the Appellants to undergo the administrative process, in order to establish a full and accurate record.

III. ARGUMENT

A. **The administrative process must be exhausted before the takings test can be applied**

Washington's test for regulatory takings is complex and requires consideration of multiple factors. The Supreme Court's most recent summation of the takings test appears in *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993), as follows:

[T]he court first examines whether the regulation substantially advances a legitimate state interest. If it does not, the regulation is a taking. If, however, the regulation does substantially advance a legitimate state interest, the court then performs a balancing test. The court asks whether the state interest in the regulation is outweighed by its adverse economic impact to the landowner. In particular, the court considers: (1) the regulation's economic impact on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action. If the court determines that a taking has occurred, compensation is mandated.

Id. at 604 (citations omitted).

Undoubtedly because the takings test is so complicated, the courts have insisted on having a full and accurate record before applying its elements. The factual record must be developed through the process of exhausting administrative remedies—that is, through the pursuit of development approvals—not through pre-trial discovery or a trial in a takings case. See, e.g., *Friedman*, 112 at 80 (“Courts cannot address inverse condemnation claims in a vacuum. . . . [The exhaustion doctrine] facilitates resolution of the question whether land use regulations so deprive the land of economic viability as to amount to a taking.”).

Even if some of the elements of a takings claim can be assessed at the outset, exhaustion is still required in order to determine the remaining elements. In *Presbytery v. King County*, 114 Wn.2d 320, 337, 787 P.2d 907 (1990), the Court suggested that the county’s wetlands policy was legitimately aimed at environmental protection. However, the Court still refused to decide the takings claim one way or the other until it had a fully developed record on the economic impact of the regulation. *Id.* (“Without knowledge of the uses to which this property can legally be put, it is not feasible to consider the factors which help to determine ‘undue oppressiveness.’ Exhaustion of

administrative remedies is, therefore, necessary in order for a court to have before it the facts necessary to make such a determination.”).

Here, it would be possible to determine that the rezone serves legitimate public purposes, among them the prevention of landslides. In fact, the GMHB already found this to be true.⁹ In addition, the character of the government action—an exercise of zoning authority—weighs against the City’s action being a taking. See *Penn. Central Transp. v. City of New York*, 438 U.S. 104, 131 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Regardless of whether some of the elements could be decided, the Court’s first task is to determine whether this claim is ripe. *Presbytery*, 114 Wn.2d at 337. Clearly, it is not.

Appellants down-play the importance of ripeness, trivializing it as a “procedural” requirement. Brief at 5. But the courts have equated ripeness with the court’s competency to decide the case. *Friedman*, 112 Wn.2d at 75 (“[R]ipeness in the context of land use regulations is a question of whether the court will exercise its jurisdiction to reach the issues in a case.”). Like subject

⁹ Collateral estoppel bars relitigation of the issues and findings made in an earlier decision, when there are: (1) identical issues, (2) a final judgment on the merits, (3) identity of the parties, and (4) no injustice to the estopped party. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004). Administrative decisions – such as the *Abbey Road* GMHB decision – have preclusive effect when the agency acted within its competence and public policy considerations support preclusion. See, e.g., *Christensen*, 152 Wn.2d at 307-08; *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

matter jurisdiction, a ripeness challenge may even be raised for the first time on appeal. *Sintra*, 119 Wn.2d at 19.

Appellants argue that the only relevant factor here is how many units they could construct on the RC-5 portion of the Property. But to allow this case to proceed without more in the record than Appellants' assertions about residential densities would be to decide the case "in a vacuum." *Friedman*, 112 Wn.2d at 80. If the purpose of exhaustion is to discern how the challenged regulation affects the land owner's bottom line, then the impact of all regulations, not just the challenged one, must be evaluated. Only the regulatory agency—not the litigants or the courts—has the authority to interpret and apply its own regulations in a manner that shapes a landowner's development on the ground. *Bellevue 120th Assocs. v. City of Bellevue*, 65 Wn. App. 594, 599, 829 P.2d 182 (1992).

B. Only a "final government decision" establishes ripeness

A takings case is not ripe until the administrative process has been fully exhausted and the local land use authority has issued a "final government decision conclusively determining" what uses can be made of the property. *See, e.g., Peste v. Mason County*, 133 Wn. App. 456, 473, 136 P.3d 140 (2006). In *Presbytery*, the Supreme Court held that absent a county decision on a building permit, no "final government decision" had been rendered. *Presbytery*, 114

Wn.2d at 340-41. The Appellants give *Presbytery* short shrift and mischaracterize its holding, stating that the takings challenge was dismissed because the *Presbytery* failed to apply for a variance. Brief at 41. Nowhere in the decision does the Court talk about whether a variance was available. Rather, the Court dismissed the case because the *Presbytery* had failed to pursue a building permit, as the Appellants here have also failed to do. *Id.* at 337.

Presbytery also contravenes Appellants' proposition that the takings claim can be sorted out in the litigation process, with the help of expert witnesses, rather than through the administrative process. The *Presbytery* Court dismissed the case even though the *Presbytery* had offered an expert opinion that the challenged wetlands regulation would restrict development on the majority of the property, thereby frustrating any "economically reasonable or profitable use." *Id.* at 325 ("[Plaintiff's expert] concluded that three or possibly four of the five lots are destroyed for any use other than open space by the 1986 Wetland Ordinance.").¹⁰

The Appellants mischaracterize or completely ignore other Washington cases that have dismissed takings claims for lack of a final government decision. See *Friedman*, 112 Wn.2d 68; *Asarco, Inc. v. Dep't of Ecology*, 145

¹⁰ In accordance with this holding, the Hulsmann affidavit should likewise be rejected in this case.

Wn.2d 750, 759, 43 P.3d 471 (2001) (“If we find “as applied” challenges justiciable before anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority.”); *Bellevue 120th Assocs.*, 65 Wn. App. at 599; *Ventures Northwest v. State*, 81 Wn. App. 363, 368, 914 P.2d 1180 (1996) (“[A] final government decision as to permitted uses of the land is generally a condition precedent to resolution of an inverse condemnation claim.”); *Peste*, 133 Wn. App. 456 (“Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.”).

C. The Appellants have failed to prove “futility”

Once the government raises ripeness as a defense, the burden shifts to the property owner to establish that it would be futile to pursue land use approvals. *Friedman*, 112 Wn.2d at 77-8; *Presbytery*, 114 Wn.2d at 338. Futility, the only exception to the ripeness doctrine in the takings context, is present only when it is obvious that no development could occur on the property. *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985). In *Orion*, the Court found that the State’s designation of the plaintiff’s property as an estuarine sanctuary meant that he could not build anything on it. *Id.* at 448 (“[T]he only permitted use of Orion’s property . . . is less intensive, nonstructural and non-extractive recreational activities . . . All other potential

uses either ‘should not’ be allowed in estuaries or are ‘prohibited’ in aquatic or estuary areas.”). Orion was not required to go through the “vain and useless” process of applying for development permits, because all applications would be denied. *Id.* at 457. Appellants have failed to prove, or even argue, that applying for development permits would be a “vain and useless act.” The only evidence suggests that Bonney Lake would accept and process applications that are consistent with the C-2/RC-5 zoning. CP 266.

Rather than arguing futility, Appellants invent a novel exception to the ripeness doctrine, “whether any discretionary decisions remain to be made.” *See* Brief at 33. No Washington court has ever held that anything short of futility excuses the exhaustion of administrative remedies in a takings case. Moreover, Appellants’ assertion that because the City Code does not allow exceptions to the one-unit-per-five-acre density maximum in the RC-5 zone, staff lacks any decision-making authority over a proposed development, is nonsensical and utterly false. For one thing, all the Appellants need to do to increase their residential density beyond six units is utilize the C-2 portion for high-density residential. For another, a substantial number of discretionary decisions would need to be made in the course of approving any development. *See supra* Part II.B.2 of this Brief.

D. The decision of this Court in *Peste v. Mason County* is squarely on point

1. *Peste* is indistinguishable on its facts

The Appellants fail to distinguish *Peste v. Mason County*, a 2006 Division II case in which this Court upheld dismissal of a case very similar to this one. In *Peste*, this Court correctly followed precedent, dismissing a takings challenge to low-density zoning because it was not ripe. *Peste*, 133 Wn. App. 456. *Peste* had appealed the County's decision not to "upzone" his property from RR 20 (one dwelling unit per 20 acres) to RR 5 (one dwelling unit per five acres). Like the Appellants, *Peste* had never applied for, much less obtained, any land use approvals under the existing zoning. This Court held:

[A]n "as applied" regulatory takings claim requires the court to compare 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. Although the Board [of County Commissioners] reached a final determination that it would prohibit rezoning the Section 21 property from an RR 20 designation to an RR 5 designation, it did not determine what uses would be permitted on the property.

This Court's decision in *Peste* is consistent not only with Washington precedent, but with an earlier U.S. Supreme Court decision in a similar case, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In *Agins*, the city downzoned the plaintiffs' property to low density residential, which allowed one dwelling unit per acre. The plaintiffs contended, as the Appellants do here,

that the down-zone devalued the property sufficiently to constitute a taking. The Supreme Court dismissed the case for lack of ripeness, finding “no concrete controversy” when the plaintiffs had failed to pursue development approvals. *Id.*

As the trial court recognized, the instant case is indistinguishable from *Peste* and *Agin*s. In all three cases, a down-zone (or a decision not to up-zone) limited the density of development on a property. In all three cases, the property owners sued for a taking without ever having sought development approvals under the current regulations. In *Peste* and *Agin*s, the appellate courts properly found that the takings claims were unripe. This Court should follow suit.

2. ***Peste* does not hold that the “only relevant question” is whether the regulation can be “waived or varied through the exercise of administrative discretion.”**

The Appellants argue that *Peste* turned upon the fact that the Mason County Code allowed a variance from maximum residential densities in the RR 20 zone. Brief at 47. Therefore, according to the Appellants, the density maximum could have been waived had *Peste* only applied for a variance. But whether a variance was available did not factor into this Court’s decision; nowhere in the decision does the word “variance” appear.¹¹ Rather, this Court

¹¹ The only reference to potential variability in density appears in footnote 12 of the *Peste* opinion. It states, “Mason County Board and Commission staff testimony indicates that

upheld the dismissal of Peste’s claim because he had never pursued any development approvals under the RR 20 zoning. In addition, Peste had not established that it would be futile for him to pursue “other uses” of the property. *Peste*, 133 Wn. App. at 474.

A failure to seek a variance is an obvious failure to exhaust administrative remedies. See, e.g., *Williamson Cty. Planning v. Hamilton Bank*, 473 U.S. 172 (1985); *Saddle Mountain Minerals LLC v. Joshi*, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004). However, the conclusion the Appellants draw from this premise—“If no variance is available then no administrative remedy is available”—does not follow, and is not supported by any authority. A lack of ripeness can be found either for a failure to seek a variance or a failure to submit a development proposal. *Palazzolo v. Rhode Island*, 545 U.S. 606, 620 (2001) (cases not ripe if there is “doubt as to whether a more modest submission or an application for a variance would be accepted”). Most ripeness cases have not involved the failure to seek a variance. More often, the land owner failed to seek development approvals under current regulations,

Peste’s residential development options under its current RR 20 designation are more opportunistic than Peste asserts and that clustered residential development is available to Peste on its RR 20 properties.” Appellants mischaracterize this footnote as suggesting that Peste could get a waiver from the density maximum in the RR 20 zone. The footnote says nothing of the sort. It merely states that clustered residential development is available. As noted, Bonney Lake’s RC-5 zone also allows clustered residential development.

even though there was no doubt that the land could be developed. See, e.g., *Presbytery*, 114 Wn.2d 320.

Furthermore, *Peste* confirms that ripeness involves consideration of factors other than whether a density cap can be waived. In *Peste*, this Court drew a distinction between the density allowed on a property and the uses allowed on the property. *Peste*, 133 Wn. App. at 474. This Court expressly noted that other uses of *Peste*'s property besides residential were potentially available, and it was necessary to determine to what use the property would be put prior to deciding a takings claim. *Id.* at 472.

E. Under *Palazzolo v. Rhode Island*, Appellants' claim is not ripe

Appellants' arguments rest almost entirely on *Palazzolo*. Contrary to the Appellants' assertions, *Palazzolo* does not weaken the ripeness doctrine, nor does it overrule any of the Supreme Court's prior decisions on ripeness. See *Penn Central*, 438 U.S. at 137; *Agins*, 447 U.S. at 260 (1980); *Williamson County*, 473 U.S. at 190; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).¹²

¹² Like *Palazzolo*, *Suitum* is distinguishable. In that case, the Court confirmed the continued viability of its prior decisions on ripeness, but held that a landowner need not transfer development rights for a takings case to be considered ripe.

In fact, the *Palazzolo* Court expressly confirmed that in cases where landowners retain the right to pursue alternative developments, they must pursue those opportunities before takings claims ripen:

This case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt as to whether a more modest submission or an application for a variance would be accepted.

Palazzolo, 545 U.S. at 620. See also *MacDonald*, 477 U.S. at 346 (“Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property.”); *Bellevue 120th Assocs.*, 65 Wn. App. at 601 (“While the outcome of such application of the regulations was likely to result in less than the Associates wanted, this does not excuse it from pursuing the [administrative] process.”). In this case, the Appellants have retained the right to submit a proposal for developing the Property that is “more modest” than 575 condominiums. Therefore, *Palazzolo* does not render their case ripe for review.

In addition, the facts of *Palazzolo* are so similar to the facts of *Orion* that if *Palazzolo* had been decided in Washington, it would have been the state's second “futility” case. In *Palazzolo*, a saltwater wetlands regulation prohibited the property owner from filling, and therefore developing, his property.

Palazzolo, 545 U.S. at 621 (“On the wetland there can be no fill for any ordinary land use. . . . And with no fill, there can be no structures and no development on the wetlands.”). Consistent with *Orion*, the U.S. Supreme Court found that it would be pointless for the property owner to pursue administrative remedies. *Id.* at 617.¹³

By contrast, this is not a case where the City’s regulations prohibit all development on the Property. There is no doubt that the Property can be developed. Appellants contend only that development would not be economically feasible. But the Property’s value, its development potential, the profits a developer might turn, and the costs to develop are all factors that must be established through the administrative process.

F. Policy considerations weigh against the Appellants and in favor of the City

The Appellants complain that the dismissal of their takings case causes them “hardship.” Brief of 50. However, the courts have expressly rejected claims of hardship and weighed the equities in favor of the government. In *Asarco*, for example, the Washington Supreme Court ruled that the plaintiff’s pre-emptive challenge to a Department of Ecology clean-up order was not ripe. *Asarco*, 145 Wn.2d at 759. Despite the inarguable inconvenience and expense,

¹³ One small parcel of Palazzolo’s property was not encumbered by wetlands and was developable. *Id.* at 618. However, the state conceded the value of this property was \$200,000, leaving no disputes over economic impact. *Id.*

Asarco was required to finish the clean-up before its challenge would be ripe for adjudication. *Id.* (“The mere convenience to Asarco of deciding the controversy ahead of Ecology’s clean-up order is not enough to ripen the claim.”); *see also Bellevue 120th Assocs.*, 65 Wn. App. at 602 (“The Associates should not be excused from completing the administrative process because compliance would have been costly . . . [S]uch expense is the inevitable cost of doing business in a highly regulated society.”) (citation omitted).

The landowner, not the public, appropriately bears the expense of exhausting the administrative process prior to suing for a taking. Subject to applicable regulations, land owners alone decide what they want to build on their property, how much they want to spend to build it, and the rate of return they want to receive. Only through the administrative process do the land owner’s plans, and costs, become clear. *See, e.g., Asarco*, 145 Wn.2d at 761 (finding “nothing in the record but speculation as to how much the clean-up might cost”). It is especially important in the instant case to develop the record on development costs, in order to refute the speculative and wildly inaccurate nature of the Appellants’ estimates. *See supra* Part II.B.E of this Brief. Because the Appellants have not undergone the administrative process, their numbers are just fuzzy math.

Appellants urge this Court to throw precedent to the wind and let the jury sort out whether the City took their Property. On that front, *Asarco* is a cautionary tale. There, the trial court rejected DOE's contention that Asarco's pre-emptive takings challenge was not ripe, and conducted a full trial on the merits. On appeal, the trial court's decision was reversed on ripeness grounds, making the superior court's lengthy trial an utter waste of time and resources. This Court should not make that mistake, but instead compel the Appellants exhaust the administrative process before pursuing any taking claims.

As the courts have recognized time and again, governments should not be forced to defend expensive takings claims until the development potential of a property has been fully exploited. In *Bellevue 120th Assocs.*, the court stated:

It seems more appropriate to say that what the Associates wants is for the court to find it a buyer by forcing the City to purchase in an inverse condemnation action without the Associates having exhausted the administrative process to show that development is impossible.

Bellevue 120th Assocs., 65 Wn. App. at 601. Similarly, here, this Court should reject the Appellants' attempt to find a buyer for their Property—*i.e.*, the public—when they have never pursued beneficial uses under the current zoning.

IV. CONCLUSION

The trial court properly dismissed the Appellants' case for lack of ripeness. Appellants complain that the 2005 rezone is a taking because it

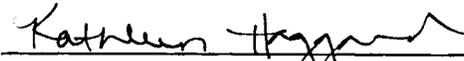
would not be economically feasible to develop their property. This is a classic example of the kind of case Washington courts have found to be unripe when the land owner has not pursued development approvals available under current regulations.

In reality, once the Appellants go through the effort of pursuing land use approvals, this case will probably disappear. The Appellants will discover that it is economically feasible to develop under the RC-5/C-2 zoning, as long as they do their homework. As a matter of policy, the City should not be forced to defend an expensive takings claim until the administrative process has been exhausted.

For the foregoing reasons, the City of Bonney Lake respectfully requests that this Court affirm the trial court's dismissal of the Appellants' case on summary judgment.

RESPECTFULLY SUBMITTED this 18th day of October, 2010.

DIONNE & RORICK



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CountyView Web Map



Map Legend

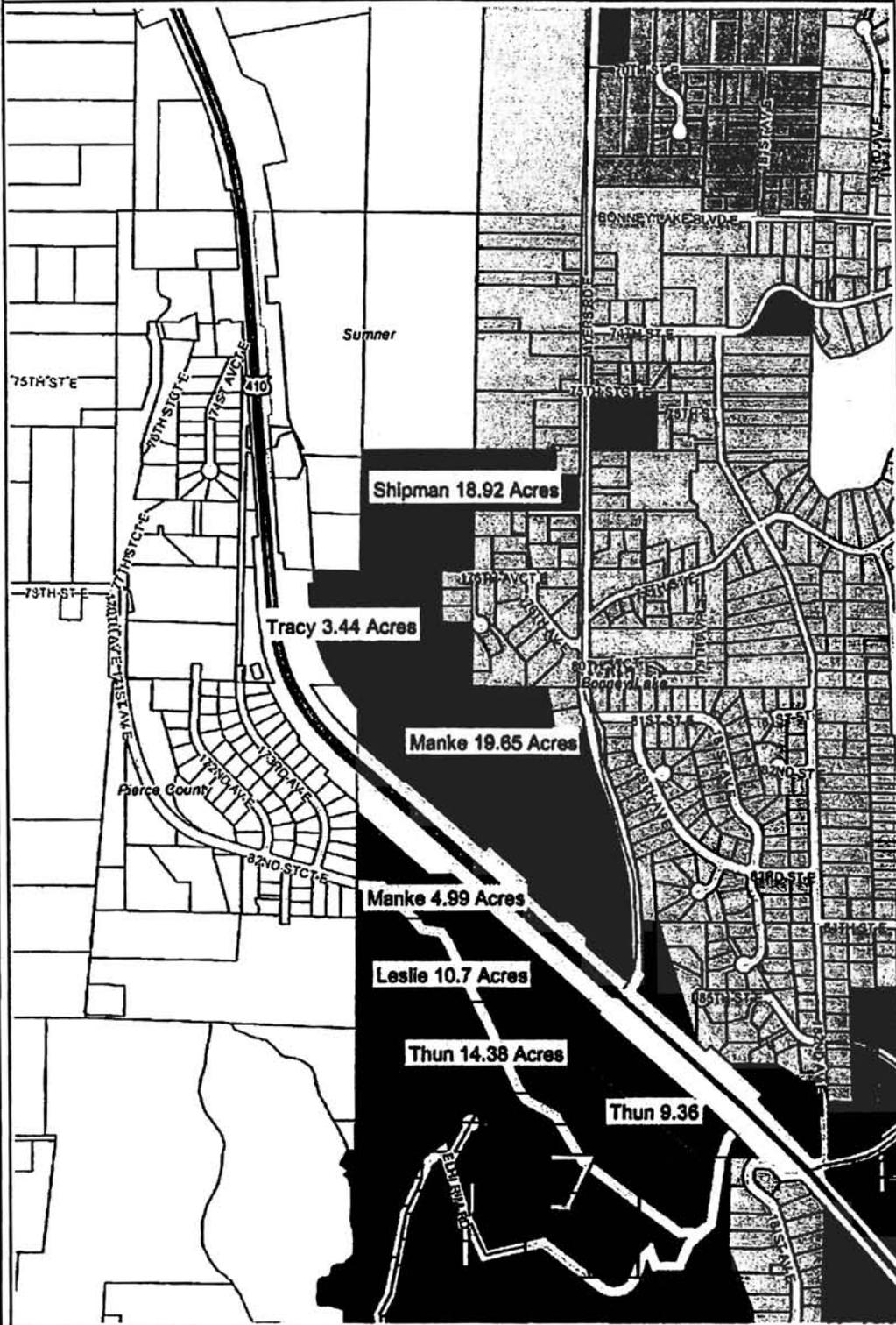
- Tax Parcels
- Roads**
- Interstate
- Limited Access State Routes
- Other State Routes
- Ramps
- Major Arterial
- Collector
- Local Access
- Zoning Overlay - Bonney Lake

Zoning - Bonney Lake

- C1
- C2
- C2-C3
- DC
- DM
- PF
- R1
- R2
- R3
- RC5

Pierce County Basemap

- Unincorporated County
- Tacoma
- Lakewood, Edgewood, Bonney Lake, Buckley, South Prairie
- Stellacoom, Fircroft, Fife, Gig Harbor, Orting, Eatonville, Roy, Carbonado, Wilkeson, Mt Rainier
- University Place, Puyallup, Auburn
- DuPont, Milton, Sumner
- Fort Lewis, McChord, McNeil Island
- Water



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent *via legal messenger*, the Brief of Respondent City of Bonney Lake to the following:

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Dated this 18th day of October, 2010.

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