

FILED  
COURT OF APPEALS  
DIVISION II

2017 APR -7 PM 3:38

No. 49690-9-II

STATE OF WASHINGTON

BY \_\_\_\_\_

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

KARL J. THUN and VIRGINIA S. THUN, husband and wife; DANIEL  
POVOLKA, SALLY BAYLEY, THERESA BOOTH, and NANCY  
LEGAS, heirs of Thomas J. Povolka; LOUISE LESLIE and TERESA M.  
AFORTH, trustees of the William and Louise Leslie Revocable Trust; and  
VIRGINIA LESLIE and KAREN LESLIE, trustees of the Virginia Leslie  
Revocable Trust,

Appellants,

v.

CITY OF BONNEY LAKE, a municipal corporation,

Respondent.

---

BRIEF OF APPELLANT

---

GORDON THOMAS HONEYWELL LLP  
Warren J. Daheim  
Margaret Y. Archer  
Attorneys for Appellant

Suite 2100  
1201 Pacific Avenue  
P.O. Box 1157  
Tacoma, WA 98401-1157  
(253) 620-6500  
WSBA No. 03992  
WSBA No. 21224

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. ASSIGNMENTS OF ERROR AND ISSUES..... 2**

**III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY 2**

**IV. SUMMARY OF ARGUMENT..... 9**

**V. ARGUMENT..... 10**

**A. STANDARD OF REVIEW..... 10**

**B. TAKINGS LAW – GENERALLY ..... 10**

**C. REGULATORY TAKINGS CLAIMS ..... 14**

**1. Federal Law..... 14**

**2. Regulatory Takings in Washington..... 18**

**VI. CONCLUSION ..... 27**

## **APPENDICES**

Appendix A Bonney Lake Ordinance No. 1160

Appendix B Declaration of Robert Young

## TABLE OF AUTHORITIES

### Washington Cases

<i>Abbey Road Corp. LLC v. City of Bonney Lake</i> , 167 W.2d 242, 218 P.3d 180 (2009).....	8
<i>Guimont v. Clarke</i> , 121 Wn. 2d 586, 854 P.2d 1 (1993) .....	18, 22
<i>Isla Verde Int’l. v. City of Camas</i> , 99 Wn. App. 127 (Div. 2, 1999) .....	23
<i>Martin v. Port of Seattle</i> , 64 Wn.2d 309, 391 P.2d 540 (1964).....	11
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062, <i>cert. denied</i> , 486 U.S. 1022 (1987).....	14
<i>Paradise Inc. v. Pierce County</i> , 124 Wash. App. 759 (2004).....	23
<i>Presbytery of Seattle v. King Co.</i> , 114 Wn.2d 320, 787 P.2d 907 (1990).....	14, 19
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992) .....	13, 22
<i>Sintra v. City of Seattle</i> , 119 Wn.2d 1, 829 P.2d 765 (1992).....	13, 18, 22
<i>Sparks v. Douglas Co.</i> , 127 Wn.2d 901, 904 P.2d 738 (1995).....	13
<i>Standler v. Smith</i> , 83 Wn.2d 405, 518 P.2d 721 (1974) .....	8

### Federal Cases

<i>City of Monterey v. Del Monte Dunes at Monterey</i> , L.2d, 526 U.S. 687, 1198 S.Ct. 1624, 143 L. Ed.2d 882 (1999).....	12
<i>Dolan v. City of Tigard</i> , 512 U.S. 374, 14 S Ct. 2309, 129 L. Ed.2d 304 (1994).....	9, 11, 12, 13
<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498, 141 L. Ed.2d 451, 118 S. Ct. 2131 (1998).....	13
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 5288, 125 S. Ct. 2074, 161 L. Ed.2d 876 (2005).....	17

<i>Lucas v. South Carolina Coastal Comm'n.</i> , 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)	14, 16, 17, 18, 19, 20, 23, 24, 26, 27
<i>Nollan v. California Coastal Comm'n.</i> , 483 U.S. 825, 97 L. Ed.2d 677, 107 S. Ct. 3141 (1987)	12
<i>Penn Central Transportation Co. v. New York City</i> , 38 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)	11, 15, 16, 17, 18, 24, 25
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)	15, 23
<i>U.S. v. Alcan Alum. Co.</i> , 49 F. Supp. 2d 96 (N.D. N.Y. 1999)	13
<i>United States v. Causby</i> , 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946)	23
<b>Out-of-State Cases</b>	
<i>Monks v. City of Rancho Palos Verdes</i> , 167 Cal.App. 4 <sup>th</sup> , 263, 84 Cal. Rpt. 3 <sup>rd</sup> 75 (2008)	21

## I. INTRODUCTION

This is a regulatory takings case based on the City of Bonney Lake's (the City's) 2005 downzone of Plaintiffs' property from commercial to essentially open space.<sup>1</sup> The property is prime commercial property bordering SR 410 at the west entrance to the City, a block from the City Center with all utilities available.

The downzone ordinance stated a number of purposes, one of which was "to protect the magnificent entry to Bonney Lake on SR 410". The former mayor of the City explained that was the primary purpose of the downzone.<sup>2</sup>

The City moved for summary judgment claiming: (1) Plaintiffs' claims were not ripe for review, and (2) Plaintiffs had not met the threshold requirement of showing that the challenged regulation went beyond preventing a public harm to confer a public benefit. The trial court held the claims were ripe then granted summary judgment. In ruling the Court conceded that "there may be some public benefit to this view" (i.e. goes beyond preventing harm), but held as a matter of law: (1) that since the ordinance did not require Plaintiffs to "contribute to a fund, develop anything, or do anything" (except suffer limitations on development) they

---

<sup>1</sup> A copy of the Ordinance is attached as **Appendix A** (CP 75-77).

<sup>2</sup> A copy of the Mayor's Declaration is attached as **Appendix B** (CP 405-408).

had not conferred a public benefit,<sup>3</sup> and (2) that in any event the view was an incidental purpose for the ordinance.

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

The trial court erred: (1) in holding that conferring a public benefit required Plaintiffs to contribute to a fund, or develop something, or do something, and (2) in holding as a matter of law that conferring a public benefit was an incidental purpose of the ordinance.<sup>4</sup>

These errors present the following issues:

(1) does conferring a public benefit require Plaintiffs to contribute to a fund, develop something, or do something (except suffer limitations on development), and

(2) viewing all facts and resulting inferences most favorably to Plaintiffs, was there a genuine issue of material fact as to the purpose of the ordinance?

## **III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Plaintiffs' Complaint sets forth the relevant facts:<sup>5</sup>

### **The Thun Parties**

Plaintiffs Karl J. Thun and Virginia Thun, Daniel Povolka, Sally

---

<sup>3</sup> RP 5

<sup>4</sup> RP 5

<sup>5</sup> Each factual statement below is supported by a request for admissions and responses. See Daheim Declaration Exh. E (CP 382-396).

Bayley, Theresa Booth, and Nancy Legas (collectively “Thun”) own a 23.94 acre parcel of land located at the West entrance to the City of Bonney Lake. The Thun parcel is parcel number 19 on the map attached to **Appendix A**.

### **The Thun Parcel**

The Thun parcel was acquired by the Thun parties in 1994 for investment purposes. At that time a portion of the property was zoned C-2 (commercial) and had been zoned commercial from 1963 when it was annexed into the City. The remaining portion of the Thun parcel was rezoned from R-1 (residential) to C-2 (commercial) in 2000. At that time the City, based on a Geotechnical Engineering Study, determined that development of the Thun parcel would pose “no probable significant environmental impacts.”

### **The Leslie Parties**

Plaintiffs Virginia Leslie Revocable Trust and William and Louise Leslie Family Revocable Trust (collectively “Leslie”) own a 10.7 acre parcel of land located immediately adjacent to the Thun property at the west entrance to the City. The parcel is shown as parcel 18 (except for the northerly portion of parcel 18) on the map attached to **Appendix A**.

### **The Leslie Parcel**

The Leslie parcel has been in the Leslie family for over 80 years and is held for investment purposes. The parcel was zoned C-2 (commercial) from the time it was annexed into the City in 1976.

### **C-2 Zoning**

C-2 zoning allows up to a maximum of 20 residential units per acre.

### **Purchase and Sale Agreements**

In March 2005, Thun and Leslie entered into Purchase and Sale Agreements agreeing to sell their parcels to Reich Land Construction (“Reich”). The sale price for the Thun property was \$6,800,000 and the sale price for the Leslie property was \$1,200,000. Over the next six months Reich spent over \$150,000 developing plans to construct a 575-unit condominium project on the Thun and Leslie parcels.

### **Application Made for Development Permit**

On September 13, 2005, Reich submitted to the City an application for a site development permit, accompanied by engineering and landscape plans, and geotechnical, hydrogeological, wetland, traffic and storm draining reports.

### **City Adopts Ordinance Down-Zoning Parcels**

Later in the day on September 13, 2005, the City adopted Ordinance No. 1160, a copy of which is attached as **Appendix A** (the “Ordinance”). The Ordinance down zoned all of the Leslie parcel from C-2 (allowing 20 units per acre) to RC-5 (allowing one unit for each five acres). The Ordinance downzoned all but 5.55 acres of the Thun parcel from C-2 (allowing 20 units per acre) to RC-5 (allowing one unit for each five acres).

### **Ordinance Destroyed Value**

The effect of the Ordinance on the Leslie parcel has reduced the value of the property from approximately \$2.50 per square foot to approximately \$.35 cents per square foot. The effect of the Ordinance on the Thun parcel has reduced the value of the Thun property from approximately \$6.00 per square foot to approximately \$.35 cents per square foot.

### **Ordinance Appropriates View Easement**

A significant purpose of the Ordinance was to create an open space corridor which “would protect the magnificent entry to Bonney Lake on SR 410.” Although the City alleged an additional purpose, to supplement the City’s steep slope ordinances, the City cited no reason why the City’s existing steep slope ordinances were inadequate to protect critical areas.

By enacting the Ordinance, the City in essence appropriated a view easement for the public under the guise of a police power regulation. If the existing steep slope ordinances were in fact inadequate, there were feasible and less oppressive solutions than restricting plaintiffs' use of their property to the extent outlined above. This was particularly true in light of the fact that Reich's development plan contemplated elimination of the only significant steep slope which existed on the parcels.

#### **Ordinance Constitutes Taking**

The enactment of the Ordinance constituted a taking of Plaintiffs' parcels without just compensation in violation of Wash. Const. Art. I, § 16, in that the Ordinance: (a) has a devastating economic impact on the Thun and Leslie parcels; (b) destroys Thun's and Leslie's investment backed expectations related to their parcels; and (c) is not justified by the nature of the safety problem (i.e., steep slopes) which the Ordinance in part purports to address.

#### **Ordinance Challenged**

In March 2008, the Plaintiffs' filed a Complaint for Damages for Regulatory Taking in Pierce County under Cause No. 08-2-06150-2. The action was dismissed on a Motion by the Defendant City on the grounds that the action was not yet ripe. That decision was appealed and on November 8, 2011, the Court of Appeals affirmed the decision of the Trial

Court “that the action was not ripe” because: (1) the size of the remaining C-2 parcel owned by the Thuns was not known; (2) further administrative proceedings were necessary to clarify the permissible uses of the remaining C-2 parcel.

### **Size of C-2 Parcel And Further Administrative Proceedings Were Had**

In October of 2013, the Thun and Leslie parties attended a pre-application conference with the City to determine what development would be allowed on their property. They submitted a conceptual plan for the meeting showing 96 units as residential, retail of 4,200 square feet, and 11,270 square feet of office space for the C-2 parcel, and one residential unit for each 5 acres of the RC-5 parcel. As a result of the meeting it was determined that the size of the C-2 parcel was 5.55 acres and the C-2 parcel would accommodate 131 residential units with 4,702 square feet of retail and 18,000 square feet of office space. Plaintiffs’ believe they have now complied with the direction of the Court of Appeals to determine the size of the C-2 parcel and to clarify the permissible uses of the parcels at issue. A requirement for any further administrative proceeding would be unreasonable. The Plaintiffs are not developers and the cost of proceeding further would be prohibitive.

### **Procedural History**

- Plaintiffs originally challenged the ordinance claiming their

development application had created a vested right to the C-2 zoning. In a 5 to 4 ruling the Supreme Court rejected the claim holding that only applications for a building permit vests zoning rights. *Abbey Road Corp. LLC v. City of Bonney Lake*, 167 W.2d 242, 218 P.3d 180 (2009).

- Plaintiffs challenged the Ordinance before the Growth Management Hearings Board, claiming the Ordinance was inconsistent with the Growth Management Act. The Board upheld the Ordinance, finding that the City's adoption of the Ordinance was not "clearly erroneous" under a standard which presumed the validity of the Ordinance.<sup>6</sup>

- Plaintiffs filed a takings claim March 13, 2008 which was dismissed on grounds of ripeness. On appeal the ruling was confirmed. *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 265 P.3d 207 (2011).

- Plaintiffs filed the present action March 30, 2016 (CP 1-8). The City moved for summary judgment on September 23, 2016 (CP 13-221). The motion was granted November 4, 2016 (CP 443-445). A

---

<sup>6</sup> Proceedings before the Growth Management Board are irrelevant here for a number of reasons: (1) the issues before the Growth Management Board and here are not identical; (2) the Growth Management Board determined whether the Ordinance complied with the Growth Management Act, not whether the Ordinance violated the Constitution; (3) the Growth Management Board has no jurisdiction over constitutional questions; (4) proceedings before the Growth Management Board are on the record developed by the City; (5) there are no witnesses; (6) there is no discovery; (7) there is no cross examination; (8) the burden of proof is not the same (i.e. "clearly erroneous" versus preponderance of the evidence.) See *Standler v. Smith*, 83 W.2d 405, 408-09, 518 P.2d 721 (1974) (a difference in burden of proof precludes collateral estoppel).

Motion for Reconsideration was denied November 21, 2016 (CP 453). This appeal was filed November 23, 2016.

#### IV. SUMMARY OF ARGUMENT

Under Washington law a threshold issue in a regulatory takings case is whether “the challenged regulation goes beyond preventing a public harm to confer a public benefit”. *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 760, 265 P.3d 207 (2011). The operative words are “goes beyond”. It does not require “preventing harm” to trump “public benefit”, or vice versa. In no event does it require an owner to contribute to a fund, develop something, or do anything (other than suffer limitations on development) to constitute a taking. That confuses “regulatory takings” cases with “exaction” cases where owners are required to contribute something, develop something, or do something, as a condition to receiving a permit.<sup>7</sup> Finally, on summary judgment, viewing all facts and resulting inferences most favorably to Plaintiffs, there is a genuine issue of a material fact (i.e. the purposes of the ordinance). For those reasons the trial court should have denied summary judgment.

---

<sup>7</sup> Also known as “unconstitutional conditions”. See *Dolan v. City of Tigard*, 512 U.S. 374, 14 S Ct. 2309, 129 L. Ed.2d 304 (1994).

## V. ARGUMENT

### A. Standard of Review

A grant of summary judgment is reviewed de novo. *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 759 265 P.3d 207 (2011). Summary judgment is appropriate only where, viewing all facts and resulting inferences most favorably to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

### B. Takings Law – Generally

Article 1 Section 16 of the Washington Constitution provides: “no private property shall be taken or damaged for public or private use without just compensation having first been made”. This provision is not limited to traditional exercises of eminent domain (formal condemnation proceedings).

There are a range of government activities which the courts have deemed to be takings or damaging in fact without the formal exercise of the power of eminent domain. The term “inverse condemnation” is used to describe those situations. In general they include physical invasions and regulatory takings. Regulatory takings include both restriction on use cases and “exaction” cases.

### **Physical Invasion Cases**

Physical invasion cases include nuisance and trespass activities. See *Martin v. Port of Seattle*, 64 W.2d 309, 391 P.2d 540 (1964) (airport noise). The measure of recovery is injury to market value, whether or not substantial.

### **Exaction Cases**

Exaction cases are those in which a regulatory agency seeks a concession, either in money or use of property in return for a government permit. See *Dolan v. City of Tigard*, 512, U.S. 374, 1148 S. Ct. 2309, 129 L. Ed.2d 304 (1994). The test (the *Dolan* test) is whether there is a “nexus” or rough proportionality between the burden imposed and the anticipated impacts of the development. The remedy is to set aside the ordinance as a violation of substantive due process.

### **Restriction on Use Cases**

Restriction on use cases are those in which the government restricts particular uses of property resulting in a significant loss of economic value. Special rules apply, as discussed below (the *Penn Central* factors). The remedy is damages for a taking or damaging. The U.S. Supreme Court has cautioned that “exaction” cases should not be confused with “restriction on use” cases. See *City of Monterey v. Del*

*Monte Dunes at Monterey*, L.2d, 526 U.S. 687, 703, 1198 S.Ct. 1624, 143 L. Ed.2d 882 (1999):

“The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the developments anticipated impacts. It was not designed to address, and is not really applicable to, the much different question arising where, as here, the land owner’s challenge is based not on excessive exactions but on denial of development.”

### **The Distinction Addressed**

The distinction between “exaction cases” and “restrictions on use cases” is addressed in an article by Timothy Butler entitled Inverse Condemnation and Regulatory Takings, Law Seminars International, Seattle, Washington July 12-13, 2001:

A. “Exaction” cases – In these cases, a governmental unit issues a rule which exacts an economic benefit from the plaintiff in return for permission to use his/her property for particular purposes. The exaction can be in many forms including required dedication of property in fee or by easements, payment of money or commitment of other resources.

#### Examples:

*Nollan v. California Coastal Comm’n.*, 483 U.S. 825, 97 L. Ed.2d 677, 107 S. Ct. 3141 (1987) – permission to build home conditioned on grant of beach easement.

*Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 302, 114 S. Ct. 2309 (1994) – permit to expand a store conditioned on grant of a “greenway” belt to the public.

*Sintra v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992);  
*Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) – grant of development permits conditioned on contribution to low income housing.

*Sparks v. Douglas Co.*, 127 Wn.2d 901, 904 P.2d 738 (1995) – dedication of rights of way as a condition for approval of development permits.

*Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed.2d 451, 118 S. Ct. 2131 (1998) – retroactive application of a statute requiring payment into a coal miners’ health benefit fund held to be a “taking” in violation of the Fifth Amendment, even though the property taken was only money, not real property; *contra.*, *U.S. v. Alcan Alum. Co.*, 49 F. Supp. 2d 96 (N.D. N.Y. 1999) (holding CERCLA is not unconstitutionally retroactive).

B. Restriction on use cases – Regulation by a governmental unit proscribing particular uses of property resulting in loss of some or all of the economic value.

Examples:

*Lucas v. South Carolina Coastal Comm'n.*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) – restriction on reconstruction of beach home in beach areas subject to hurricanes.

*Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062, *cert. denied*, 486 U.S. 1022 (1987); *Presbytery of Seattle v. King Co.*, 114 Wn.2d 320, 787 P.2d 907 (1990) -- development precluded in pristine shoreland/wetland area.

**C. Regulatory Takings Claims**

**1. Federal Law**

Governmental police powers authorize adoption of regulations for the health, safety, and welfare of the public. In general, the government need not compensate a citizen harmed by the exercise of the police power. But there are limits. If exercise of the police power becomes confiscatory, a citizen may be entitled to compensation under the “takings” clause of the Fifth Amendment.<sup>8</sup> Determining when the line is crossed—when exercise of the police power constitutes a “taking”—is an evolving concept of constitutional law.

**a) Before 1970 – *Mahon***

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158,

---

<sup>8</sup> The Fifth Amendment also applies to States through the Fourteenth Amendment.

67 L. Ed. 322 (1922), the U.S. Supreme Court began its development of the concept of regulatory takings. Pennsylvania's laws prohibited coal mining that produced severe ground subsidence, which made it commercially impossible to mine coal in certain areas. The Court rejected the notion that the constitutional requirement of just compensation was limited to traditional exercises of eminent domain (formal condemnation proceedings). Instead, the Court noted that regulatory activity can "go too far," having such an impact on property that it is the functional equivalent of an exercise of eminent domain. *Id.* at 415-16. The Court did not lay out clear standards as to when a regulatory action "goes too far." It did, however, hold that, on the *Mahon.*, facts the government had "gone too far." *Id.*

**b) After 1970 -- Penn Central Transportation Co.**

In 1978 the U.S. Supreme Court refined "takings" law in *Penn Central Transportation Co. v. New York City*, 38 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). In that case, Grand Central Station was declared a landmark under New York City's historic preservation ordinance. Penn Central, the owner, proposed to "preserve" the original station while building a 55-story building over it. The city denied the construction permit. *Id.* at 109-115. The Court rejected Penn Central's takings claim, explaining that the city ordinance served a valid public purpose and, so far

as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the station as it was. Responding to Penn Central's argument that the ordinance would deny it the value of its "pre-existing air rights" to build above the terminal, the Court held that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." *Id.* at 130-31. In any event, the air rights could be sold to others. The Court also applied a multi-factor test for evaluating a claim that specific government action has "taken" property. Courts must consider and balance three factors:

- (1) the economic impact of the regulation on the property;
- (2) the extent to which the regulation interferes with investment-backed expectations; and
- (3) the character of the governmental action (whether it furthers an important interest and could have been accomplished by less intrusive means).

*Id.* at 123-24. These are called the "*Penn Central* factors."

**c) 1990 – 1999 -- *Lucas***

In 1992, the Supreme Court further refined federal regulatory takings law in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In that case, Lucas bought two South Carolina beachfront lots intending to develop them. Before he

initiated any development of the lots, the state enacted legislation to protect its beaches, which prevented development of the lots. The parties stipulated that the parcels had no remaining economic value. The Court held that a regulation which “denies all economically beneficial or productive use of land” is categorically a taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitation on the use of the property. *Id.* at 1018-19. The Court explained, however, if there was no such categorical taking, one should use the usual case-specific *Penn Central* balancing approach for determining takings. *Id.* at 1016-19.

**d) 2000 -- *Lingle***

Finally, the Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 5288, 125 S. Ct. 2074, 161 L. Ed.2d 876 (2005), gave its most recent clarification of federal regulatory takings law. *Lingle* involved a limitation by Hawaii on the contractual rights of oil companies. In holding that the regulation constituted a “taking” the Court clarified some confusion that had crept into constitutional analysis of taking. The Court held that there were only two tests for a regulatory taking; that is the *Lucas* test (total loss of all economically feasible use); or the *Penn Central* test (weighing three factors). *Id.* at 538.

## 2. Regulatory Takings in Washington

Article I, Section 16 of the Washington Constitution prohibits the taking of private land for public use without payment of just compensation. Washington's test for evaluating takings claims under its constitution was set forth in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). The court held there that a taking occurred when the legislature overregulated trailer court operators.

The court in *Guimont* patterned its analysis after that of the U.S. Supreme Court in *Penn Central* and *Lucas*. It did add a threshold question, which some argue is already included in the *Penn Central* analysis. That is, whether the regulation seeks less to prevent harm than to impose a requirement of providing an affirmative public benefit. *Guimont*, at 603. If the answer is yes, one proceeds to *Lucas* and *Penn Central*. *Id.* at 603-04. See *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 760, 265 P.3d 207 (2011).

### a) Harm/Benefit

A useful guide to the harm/benefit analysis is found in *Sintra Inc. v. Seattle*, 119 Wn.2d 1, 15, 829 P.2d 765 (1992):

It is permissible for legislative bodies to wield police power to protect activities which are similar to public nuisances . . . Thus land use regulations in the nature of restricting nuisance like activity is permissible. But regulations which enhance public interests and go beyond preventing harmful activity may constitute a taking.

Here the ordinance clearly goes beyond preventing harm. It confers a public benefit (a view easement). In addition, the claimed harm preventing purpose is a sham for the reasons discussed below, (starting at p. 25). Standing alone it would not survive a due process challenge.<sup>9</sup>

The harm preventing/benefit conferring test is not a part of federal takings law and has been severely criticized for remaining part of Washington law. See *The Path Out of Washington Takings Quagmire; The Case for Adopting the Federal Takings Analysis*.<sup>10</sup>

Furthermore, as a practical matter, the harm-benefit element is unworkable. When the Washington State Supreme Court announced it in *Presbytery*, the Court acknowledged ‘that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees.’ Nevertheless, the Washington State Supreme Court adhered to that element. By contrast, the U.S. Supreme Court made a similar observation two years later in *Lucas* observed that such an element would call for a distinction that “is difficult, if not impossible, to discern on an objective, value-free basis . . .” [T]he distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder . . . . Whether one or the other of the competing characterizations will come to one’s lips in a particular case depends primarily upon one’s evaluation of the worth of competing uses of real estate.”

Nonetheless, the requirement is still part of Washington Takings law and is dealt with below.

---

<sup>9</sup> A regulation must serve to solve the problem addressed. See *Presbytery of Seattle v. King County*, 114 W.2d 320, 330, 787 P.2d 907 (1990). Since trees can still be cut and homes, schools and churches can still be built on the property, the ordinance does nothing to diminish the risk of landslides.

<sup>10</sup> 86 Washington Law Review 125 (2011).

**b) The Stated Purposes of the Ordinance**

The ordinance states its purpose is to make zoning consistent with the City's comprehensive plan. It stated further purposes as follows: 1) supplement the critical areas code in managing areas that are steep and prone to geologic instability; 2) protect tree cover on areas that due to steepness cannot be densely developed without clear-cutting and terracing; 3) protect the magnificent entry to Bonney Lake on SR 410; and 4) comply with RCW 36.70A.160 which requires the City to identify open space corridors within and between urban growth areas.<sup>11</sup>

**c) How to Determine Purpose**

The case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L. Ed.2d. 798 (1992) gives guidance as to how to determine a legislative purpose in a regulatory takings claim. In *Lucas* the government had adopted an ordinance regulating shoreline development. Some claimed the purpose was to protect shorelands, others claimed the purpose was to promote tourism and protect flora. The Court said that to determine the purpose: (1) the Court should go beyond the ordinance itself, since any drafter could state a harm preventing purpose,<sup>12</sup>

---

<sup>11</sup> Ordinance Appendix A.

<sup>12</sup> The Court said:

Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the takings clause requires courts to

and (2) the court should consider all the surrounding facts, including whether other property owners similarly situated were treated the same.

In our case there are only two sources presented to date to determine the purpose of the ordinance.<sup>13</sup> Those two sources are the ordinance itself and the declaration of the former Mayor describing the surrounding facts. The ordinance itself does not rank the purposes. Neither should the trial court just because it may have felt that one purpose was more important than another. The facts stated in the Mayor's declaration are uncontested. They show that concern for landslides could not have been a primary purpose of the ordinance, since a landslide problem did not exist.<sup>14</sup>

**d) Trial Court Ruling**

The trial court conceded that "there may be some public benefit to this view" (i.e. goes beyond preventing harm) but held as a matter of law: (1) that since the Ordinance did not require Plaintiffs to "do anything"

---

do more than insist upon artful harm preventing characterizations.

<sup>13</sup> At trial both the City and Plaintiffs intend to offer evidence of geologists as to whether landslide concerns had any basis in fact.

<sup>14</sup> Baseless speculation as to future slides does not justify violating the Constitution. See *Monks v. City of Rancho Palos Verdes*, 167 Cal.App. 4<sup>th</sup>, 263, 84 Cal. Rpt. 3<sup>rd</sup> 75 (2008).

they had not conferred a public benefit,<sup>15</sup> and (2) that in any event the view was an incidental purpose for the Ordinance.<sup>16</sup>

**e) Exaction (doing something) not required when basis of claim is restriction on use rather than exaction as condition of permit**

It is unclear how the Court concluded it was necessary for an owner to be required to “do something” in order to confer a public benefit. The City did cite the Court to *Guimont v. Clark*, 121 Wn.2d 586 (1993), *Sintra v. City of Seattle*, 119 Wash.2d 1 (1992), and *Robinson v. City of Seattle*, 119 W.2d 34 (1992). In all three cases the owners were required to pay special fees as a condition of obtaining permits. Although not labeled as such they were all “exaction” cases. They are not authority for restriction on use claims.

**f) Public Received Benefit at Plaintiffs’ Expense**

Most takings cases involve restrictions on use which don’t require the owner to do anything other than suffer the loss of full use of his property. The trial court’s requirement of an “exaction” would essentially eliminate liability in any “restriction on use” cases, regardless of how severe the owner’s loss of value.

To support its ruling, the Court cited *Paradise Inc. v. Pierce*

---

<sup>15</sup> RP 5

*County*, 124 Wash. App. 759 (2004). *Paradise* involved an ordinance prohibiting gambling. The Court held “there simply is no showing that the ordinance goes beyond regulating a public harm”. Nothing in the *Paradise* case supports this Court’s requirement that the owner must “do something” to provide a public benefit.

There is one case in Washington which does help define what it means to “provide an affirmative public benefit”. That case is *Isla Verde Int’l. v. City of Camas*, 99 Wn. App. 127 (Div. 2, 1999). In that case the court held that a 30% open space set aside ordinance constituted a taking. The City argued there could be no taking because it did not require *Isla Verde* to transfer title to the set aside land. The court said (p. 138):

But alienation of title is not a necessary predicate to a taking; the essence of the harm is the government’s unconstitutional interference with one’s right to use and enjoy property. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (regulation preventing construction of owner’s land constituted taking); *United States v. Causby*, 328 U.S. 256, 261, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (path of low flying aircraft constituted taking of airspace above owner’s land); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922) (restriction of mining activity constituted taking.)

The Thun facts are similar to *Isla Verde*. In *Isla Verde* the developer was required to leave 30% of his property in open space.<sup>17</sup> The purpose was in

---

<sup>16</sup> RP 5

<sup>17</sup> See also *Lucas v. South Carolina Coastal Council*, *supra*, involved restrictions on development. The owner was not required to do anything other than suffer a loss of development rights.

part for wildlife preservation. In Thun the owners are essentially required to leave almost 99% of their downzoned property in open space to provide what is essentially a view easement for the public. In both cases the land owners were required to surrender a significant right to use and enjoy their property, but without passage of title in either case. One could use the word “contribution” to describe what the owners have yielded to the public, but that connotes something given voluntarily. The essence in both cases is that the government has severely limited the owner’s use of their property to confer a public benefit which should be paid for by the entire community. Nothing has physically passed hands but the result is the same. The owners have been forced to surrender a portion of their development rights in order to confer a view easement to the public. The finder of fact will determine whether the loss sustained by Plaintiffs is sufficient to require the City to pay damages under the *Penn Central* factors.

**g) Public Benefit Not Incidental**

It is also unclear on what basis the Court concluded that a public benefit was an incidental purpose of the Ordinance. The threshold showing is simply that the Ordinance “goes beyond” preventing a public harm. It does not require public benefit to trump “preventing harm”. It does not suggest a weighing of purposes, which is a requirement in

applying the *Penn Central* factors. In applying the *Penn Central* factors the purposes are weighed against the negative impact on value of the owner's property.

Not only is "weighing purposes" not a factor in a harm/benefit analysis, it certainly is improper on a motion for summary judgment. But if weighing was in order, the scale tilts heavily in Plaintiffs' direction based on what was presented. First, the Ordinance itself does not rank the various purposes stated. Second, the facts stated in the Mayor's declaration are uncontested. They show that concern for landslides could not have been much of a purpose of the Ordinance since landslide problems did not exist.

The harm preventing (i.e., landslide) recitation of the ordinance is suspect at best for a number of reasons:

- The City already had a critical areas ordinance under which the City relies exclusively on geotechnical reports to determine if steep slopes present a danger.<sup>18</sup>
- In adopting the Ordinance, the City was presented with no studies which indicated that the critical areas ordinance was inadequate or that Plaintiffs' properties were unstable.<sup>19</sup>

---

<sup>18</sup> Daheim Declaration Exh. C. (CP 360) See also Young Declaration App. B).

<sup>19</sup> *Id.* at 360.

- Over the years the City approved construction of hundreds of homes in the “Potential Landslide Area”, including Sky Island, Panorama Heights and Panorama West. No applications for development in the area have ever been turned down because of steep slopes.<sup>20</sup>

- The ordinance on its face applied to eight properties. All but plaintiffs’ properties were vested at the time of the ordinance, making plaintiffs the only parties targeted.<sup>21</sup>

- Thun’s proposed development would eliminate all steep slopes on their properties.<sup>22</sup>

- The ordinance does not prevent the cutting of trees or the building of structures and, therefore, does not substantially advance the City’s purported interest in preventing landslides. The City’s reference to the Oso landslide nine years after the City ordinance is an emotional appeal having no relevance. There a timber company and the State clear cut steep slopes, were aware of a long history of landslides<sup>23</sup> and failed to warn homeowners. If safety was truly a concern, all the City had to do was amend its critical area ordinance to prevent all building on steep

---

<sup>20</sup> *Id.* at 360. The fact that other landowners similarly situated are permitted to continue a use denied to Thun proves the use is not a nuisance. See *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1031, 120 L. Ed.2d 298, 112 S. Ct .2886.

<sup>21</sup> Young Declaration ¶ 3.a.

<sup>22</sup> Daheim Declaration Exh. C. (CP 360)

<sup>23</sup> The area was known as “Slide Hill” with a history of landslides going back to 1937.

slopes. That of course would have made no sense in light of the fact that steep slopes are not necessarily hazardous.<sup>24</sup> In short, the ordinance purports to address a problem which did not exist.

#### **h) Purpose and Motive Distinguished**

The court stated it did not want to “look behind the ordinance to the motive” (RP 5). But “motive” and “purpose” are not the same. Purpose is “that which one sets before him to accomplish; an end, intention or aim, object, plan, project”. . . Black, Law Dictionary 1400 (4<sup>th</sup> Ed. 1951). Motive is “the moving power what impels to action for a definite result. [It is] that which incites or stimulates a person to an act” . . . Black, Law Dictionary 1164 (4<sup>th</sup> Ed. 1951). Motives are judged subjectively and can lapse into “mind reading”. Purpose can and should be judged by objective factors, as discussed in *Lucas*. Here, objective factors, as recited by the former Mayor, show that avoiding harm (i.e. landslides) was not the true purpose since a landslide threat was basically non-existent.

### **VI. CONCLUSION**

The City has dramatically limited Plaintiffs’ right to improve their property in order to “enhance a public interest” (i.e., the magnificent entry

---

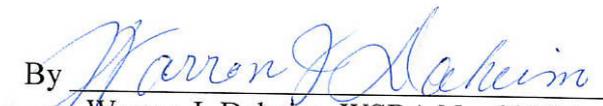
<sup>24</sup> Daheim Declaration Exh. A, Exh. 3. (CP 308) City staff report: “We need to go back to first principles. The first is that best available science must rule. The line in the sand

to Bonney Lake). Plaintiffs have met the threshold test for a “taking”. Whether Plaintiffs’ loss is dramatic enough balanced against the public’s gain is another question, to be resolved at trial. Allowing the Plaintiffs to have their day in court will not open Pandora’s Box or weaken the ability of elected officials to pass regulations protecting the health or safety of the public. It may send a message to legislators to be cautious when significantly interfering with citizens’ rights to use and enjoy their property. Upholding the Constitution is never a bad thing.

Dated this 6 day of April, 2017.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
Warren J. Daheim, WSBA No. 03992  
Margaret Y. Archer, WSBA No. 21224  
Attorneys for Appellants

---

between properties that can and cannot be developed must be based on actual danger, not an arbitrary cutoff.”

2017 APR -7 PM 3:37

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I, Gerri Downs, certify that on the 7<sup>th</sup> day of April 2017, I forwarded a true and correct copy of the foregoing Appellants' Brief to Defendant as follows:

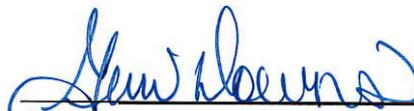
Attorneys for Defendant

Andrea L. Bradford	X	U.S. MAIL
Kathleen J. Haggard	X	VIA EMAIL
PORTER FOSTER RORICK LLP	<input type="checkbox"/>	VIA MESSENGER

601 Union Street, Suite 800  
Seattle, WA 98101  
Phone: (206) 622-0203  
[andrea@pfrwa.com](mailto:andrea@pfrwa.com)  
[kathleen@pfrwa.com](mailto:kathleen@pfrwa.com)

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

Dated this 7<sup>th</sup> day of April, 2017, at Tacoma, WA.



Gerri Downs, Legal Assistant  
[gdowns@gth-law.com](mailto:gdowns@gth-law.com)  
Gordon Thomas Honeywell LLP

# APPENDIX A

ORDINANCE NO. 1160

PUBLIC VIEWING COPY  
PLEASE DO NOT REMOVE

**AN ORDINANCE OF THE CITY OF BONNEY LAKE,  
WASHINGTON REZONING VARIOUS STEEP SLOPES TO  
BE CONSISTENT WITH THE COMPREHENSIVE PLAN**

WHEREAS, the Growth Management Act requires that comprehensive plans and development regulations be consistent, and

WHEREAS, in 2003 the City identified 65 "inconsistency areas" between its comprehensive plan and zoning; and

WHEREAS, the City resolved most of the inconsistencies in 2004 by changing the Comprehensive Plan to match the Zoning; and

WHEREAS, this ordinance concerns certain inconsistency areas which the City is resolving by changing the Zoning to match the Comprehensive Plan; and

WHEREAS, some of the inconsistencies are proposed to be resolved separately through applying appropriate zoning for the Downtown and by further changes to the Comprehensive Plan; and

WHEREAS, SEPA has been complied with; and

WHEREAS, following public hearings on June 1 and June 15, 2005, the Bonney Lake Planning Commission recommended that the Bonney Lake City Council approve the rezones set forth in this ordinance; and

WHEREAS, the proposed zoning reclassifications comply with the criteria stated in BLMC 18.52.030; and

WHEREAS, the Bonney Lake City Council has determined that the interests of the people of the City of Bonney Lake will be best served by these rezones; and

WHEREAS, further purposes for these particular rezones are to 1) supplement the critical areas code in managing areas that are steep and prone to geologic instability; 2) protect tree cover on areas that due to steepness cannot be densely developed without clear-cutting and terracing; 3) protect the magnificent entry to Bonney Lake on SR 410; and 4) comply with RCW 36.70A.160 which requires the City to identify open space corridors within and between urban growth areas.

**NOW THEREFORE THE CITY COUNCIL OF THE CITY OF BONNEY LAKE,  
WASHINGTON DO ORDAIN AS FOLLOWS:**

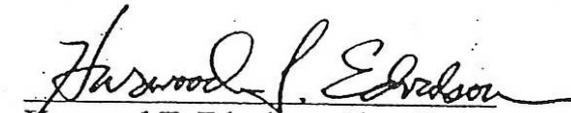
**Section 1.** The real properties depicted on Exhibit A attached hereto are hereby rezoned to RC-5 Residential/Conservation District.

**Section 2.** This ordinance shall take effect after its passage and five days after its publication as required by law.

[The Mayor having not signed this ordinance which was passed by the City Council the 13<sup>th</sup> day of September, 2005, it became valid ten days after the date of adoption by the City Council.]

\_\_\_\_\_  
Robert Young, Mayor

ATTEST:

  
\_\_\_\_\_  
Harwood T. Edvalson, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
James J. Dionne, City Attorney

Passed: September 13, 2005

Valid: September 23, 2005

Published: September 28, 2005

Effective: October 3, 2005

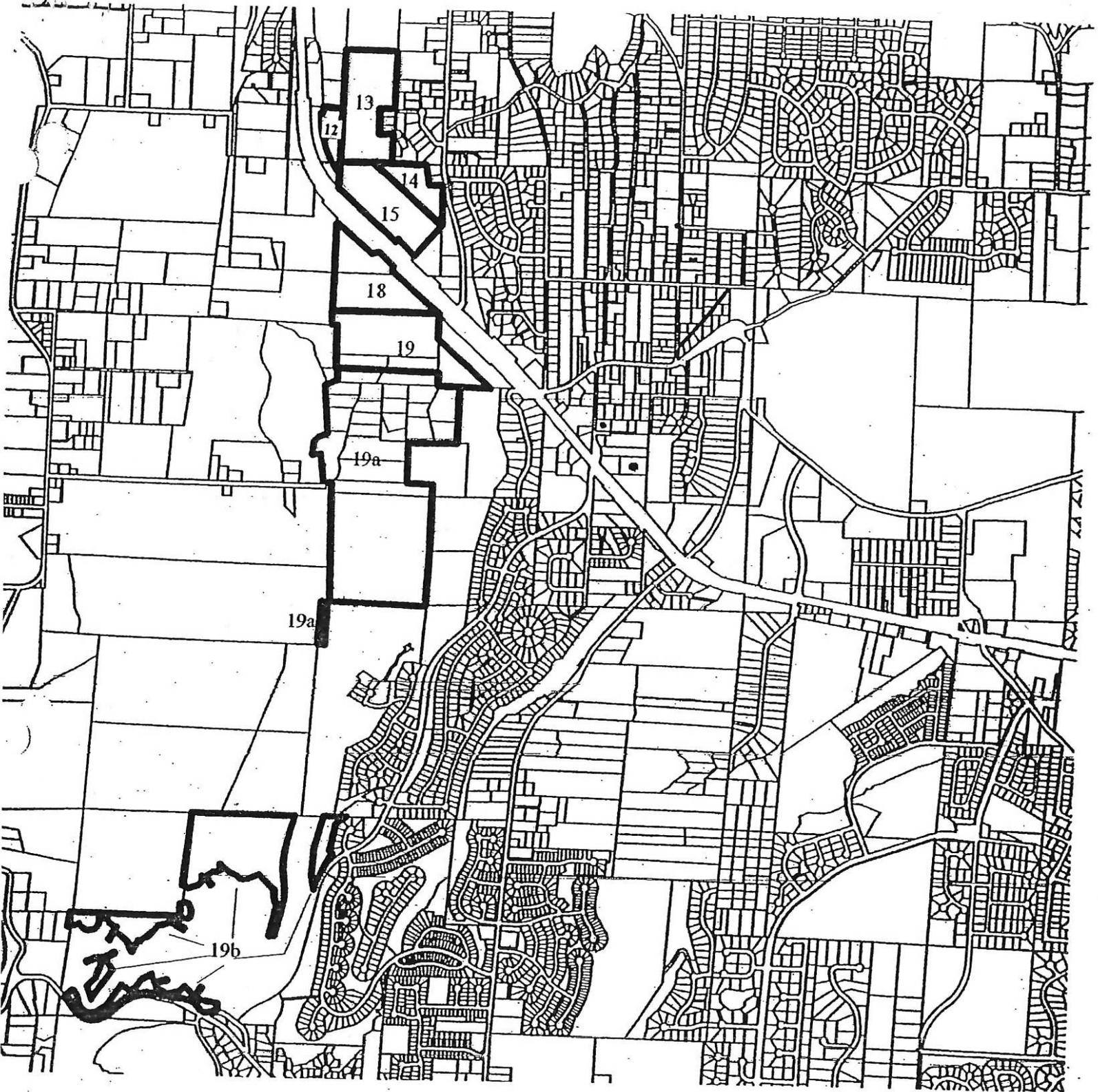


Exhibit A to Ordinance No. 1160  
Proposed Rezones to  
make zoning consistent  
with the Comprehensive Plan



0 1000 2000 3000 4000 5000 Feet

# APPENDIX B

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

KARL J. THUN and VIRGINIA S. THUN,  
husband and wife; DANIEL POVOLKA, SALLY  
BAYLEY, THERESA BOOTH, and NANCY  
LEGAS, heirs of Thomas J. Povolka; LOUISE  
LESLIE and TERESA M. AFORTH, trustees of  
the William and Louise Leslie Revocable  
Trust; and VIRGINIA LESLIE and KAREN  
LESLIE, trustees of the Virginia Leslie  
Revocable Trust,

Plaintiffs,

vs.

CITY OF BONNEY LAKE, a municipal  
corporation,

Defendant.

NO. 16-2-06643-2

DECLARATION OF ROBERT YOUNG IN  
RESPONSE TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

THE HONORABLE STANLEY J. RUMBAUGH

Hearing Date: October 28, 2016

Hearing Time: 9:00 a.m.

I, Robert Young, declare and state as follows:

1. I am over 21 years of age and competent to testify to the matters set forth  
in this declaration. I make this declaration based on my own personal knowledge.

2. I was a licensed real estate broker in the State of Washington with over  
four years of experience in both residential and commercial real estate. I was Mayor of  
City of Bonney Lake from 1998 through 2005.

1           3.     I was present at the meeting of the Bonney Lake City Council on September  
2 5, 2005 which adopted Ordinance No. 1160. I voted "no" and refused to sign the  
3 ordinance for the following reasons:

4           a)     That the ordinance only applied to the Thun and Leslie properties  
5 since the other properties referred to in the ordinance had vested rights to develop their  
6 properties under existing ordinances.

7           b)     The City had historically allowed development of steep slope  
8 properties in the City. To my knowledge no development request had ever been turned  
9 down because of steep slopes.

10          c)     The City already had a Critical Area Ordinance to protect against  
11 landslides from steep slopes based on furnishing a geological report showing that  
12 development was safe.

13          d)     The ordinance did nothing to add to or supplement the existing  
14 Critical Areas Ordinance. Timber cutting was still allowed under RC-5 zoning, as was the  
15 building of structures, including residences, schools, churches, and public utility facilities.

16          e)     The council had no studies or scientific information to indicate that  
17 the existing Critical Areas Ordinance was insufficient.

18          f)     To my knowledge the Thun and Leslie properties had been annexed  
19 into the City on the representation they would be zoned commercial.

20          g)     It appeared to me that the primary purpose of the council in  
21 adopting Ordinance 1160 was not to address the danger of landslides. If that had been  
22 the case we would have simply decreed that there would be no building on steep slopes  
23 anywhere in the City. I believe that the primary purpose of the ordinance was correctly  
24 express by the staff report recommending adoption of Ordinance No. 1160 as follows:  
25  
26

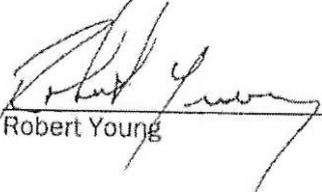
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

"The current entry to Bonney Lake is magnificent because one arrives at the top of the plateau and finds the small City framed by tall trees. This imparts a pleasant sense of arrival. This gateway effect is lost if development is continuous from Sumner to Bonney Lake."

That being the purpose I believed the City should have paid the property owners for downzoning their properties.

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

Dated at Tacoma, Washington, this 11 day of October, 2016.

  
Robert Young