

No. 49690-9-II

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.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The City dramatically downzoned Thun's property claiming the purpose was to prevent a public harm (i.e. landslides). The real purpose was to confer a public benefit (i.e. a scenic easement), as evidenced by a host of objective factors¹ including the following:

- The Thun property had never suffered a landslide;
- No applicants for development in the area had ever been turned down because of steep slopes;
- The City already had a critical areas ordinance under which the City relied exclusively on geotechnical reports to determine if steep slopes presented a danger;
- In adopting the ordinance, the City was presented with no studies which indicated the critical areas ordinance was inadequate or plaintiffs' properties were unstable. In fact, a number of geological studies proved that Thun's property was suitable for high density development; and
- By addressing a non-existent problem on the basis of rank speculation, the City failed to substantially advance a

¹ See, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), requiring courts to go beyond the face of an ordinance to discover its purpose: "We think the takings clause requires courts to do more than insist upon artful harm preventing characterizations."

legitimate state interest (i.e. the prevention of landslides)

but instead conferred a public benefit (a scenic easement).

The trial court used the wrong standard in deciding the harm/benefit issue and erred in refusing to consider evidence beyond the face of the ordinance to discover its real purpose. The court did correctly decide that the issues were ripe for adjudication.

II. THE TRIAL COURT USED THE WRONG STANDARD IN DECIDING THE HARM/BENEFIT ISSUE

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 City argues, and the trial court erred by holding, that “conferring a public benefit” requires property owners to “do something extraordinary, such as paying for housing units,”² citing *Guimont v. Clarke*, 121 W.2d 586 (1993). But *Guimont* was an “exaction” case, not a “restriction on development” case. Exaction cases allow development in return for payment of money or some other concession. Restriction on development cases simply prohibit certain uses. No payment of money or granting of any concession will lift the prohibitions.

² City brief p. 20, R.P. 68

The City correctly points out that the *Thun* case is not an “exaction” case, yet continues to argue that payment of money or granting of concessions is necessary for a public benefit. It is a restriction on use case. Nothing *Thun* could do would lift the restriction on use. It meets the threshold requirement of conferring a public benefit inasmuch as the real purpose of the ordinance at issue was to “protect the magnificent entry to Bonney Lake on SR 410” (a scenic easement).

The trial court also erred by holding, as a matter of law, that the harm preventing purpose of the ordinance outweighs the public benefit purpose.³ This despite solid and uncontested evidence that the harm preventing reason for the ordinance (landslides) was nonexistent. No less an authority than the U. S. Supreme Court has held that evidence of purpose beyond the face of the challenged ordinance should be considered when dealing with constitutional claims. *See, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026, 112 S. Ct. 2886, 121 L.Ed.2d 798 (1992).⁴

Here the City can point to no studies or history of landslides on *Thun*’s property to indicate that the City’s existing critical areas ordinance is insufficient. The City’s critical areas ordinance relies on site-specific

³ R.P. 68.

⁴ Consideration of such evidence is not mindreading.

baseless speculation, as to future slides. *See, Monks v. City of Rancho Palos Verdes*, 167 Cal.App.4th 263, 84 Cal.Rptr.3d 75 (2008) (holding that baseless speculation as to future slides did not justify violating the constitution). The City's departure from an objective standard to signal danger is cause enough to question the true purpose of the down zoning ordinance.

III. THE TRIAL COURT DID NOT ADDRESS THE MERITS

The City moved for judgment claiming that Appellants did not meet the threshold issue for a taking i.e., that is whether the regulation goes beyond preventing a public harm to confer a public benefit. Having incorrectly decided that the threshold issue was not met, the trial court did not address the so-called *Penn Central*⁵ factors. Under *Penn Central* 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 government action.

The City now argues that despite the fact the *Penn Central* factors were not addressed by the trial court, the City should be awarded summary

⁵ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d. 631 (1978).

judgment on appeal on those factors alone.⁶ The answer is that issues not addressed by the trial court cannot be raised on appeal.⁷

**IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DECIDING THAT PLAINTIFFS' CLAIMS WERE RIPE.⁸**

The City also moved to dismiss claiming the issues were not ripe. The motion was a procedural motion. It was not a motion on the merits. In ruling on the City's motion, the court recognized that the ripeness defense invoked was "prudential ripeness", not "jurisdictional" (sometimes called "constitutional") ripeness. Jurisdictional ripeness asks whether there is a "case or controversy" as required by Article II of the U.S. Constitution. Jurisdictional ripeness is not discretionary. It cannot be waived. The City does not claim a lack of jurisdictional ripeness.

Prudential ripeness asks whether the issues are fit for judicial decision and the hardship of withholding court consideration. See *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008); *Adam Bros.*

⁶ City Brief, p. 25. Thun would argue that (1) the economic impact is dramatic; (2) the ordinance clearly interfered with investment backed expectations, and (3) the character of the City's action is to address a nonexistent nuisance problem. As such the restraint on development is not justified. See *Creppel v. U.S.* 41 F.3d 627 (Fed. Cir. 1994). (If state nuisance law does not justify the restraint, the court must proceed to the remaining criteria).

⁷ The City told the trial court it was unnecessary to address those issues. C.P. 36, n. 7: "Failing to meet these threshold inquiries ends the court's analysis, and the court need not proceed further to ask whether the rezone advances a legitimate state interest or balance the three factors outlined in *Guimont*, 121 Wn.2d at 604."

⁸ The standard for review on ripeness is abuse of discretion. The City has failed to claim an abuse of discretion.

Farming Inc. v. County of Santa Barbara, 604 F.3d 1142 (9th Cir. 2010).

Prudential ripeness is not jurisdictional. Prudential ripeness is discretionary. As such, the court had discretion to simply assume that ripeness was met and to proceed with the merits. See *McClung* and *Adam Bros. supra*. As the court said in *McClung* at p. 1224: “Because this case raises only prudential ripeness concerns, we have discretion to assume ripeness is met and proceed with the merits of the *McClung*’s takings claim.”

That is essentially what this trial court did. In ruling on ripeness, the court said:

First, with respect to the issue about ripeness, I conclude that this dispute is ripe for review. The Court of Appeals on the prior go-round found it was not ripe. Since then there has been some change. There was the preliminary plan application process. I forget the exact name for it. And apparently the city staff found that the project that was presented was generally compliant with the zoning. At least my reading of the documents is that they didn’t reject it outright. So they have not applied for specific permits. Nothing has vested. We have kind of a general description. Probably other things could be done. More could be done, certainly.

But I think this does give us a reasonable idea of what can be done, I think, and the concept of prudential ripeness that was raised, I think, is a good one here. We have a dispute that needs to get resolved at some time. I’m not sure it will be resolved today, but at least for this step can be

resolved, so I think this is ripe for review.⁹

V. CONCLUSION

The trial court made two mistakes. First, the court confused “exaction” cases with restriction on use cases. In exaction cases the government requires the payment of money or the granting of some concession as the price for granting a permit. Restriction on use cases simply prohibit certain uses. No amount of money or concessions will result in a permit for the forbidden uses. This is a restriction on use case. It prohibits high density residential development.¹⁰ The trial court should, therefore, not have required the plaintiffs “to do something”¹¹ in order to be deemed to have conferred a public benefit. The public benefit flows from the restriction on use, which effectively grants a scenic easement to the public.

Second, the trial court erred in refusing to consider evidence beyond the face of the ordinance to discover its real purpose. The court said that would be mindreading. But mindreading is not necessary to discover the true purpose of the ordinance. It is necessary to consider the surrounding facts. As confirmed in the recent travel ban case of *State of*

⁹ R.P. 65-66.

¹⁰ Interestingly it allows churches and schools to be built on what the City claims is landslide prone properties.

Washington v. Trump, et al., 847 F.3d 1151 (2017). “It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating [constitutional rights claims].” In the same vein, the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1990) held that courts should consider all surrounding facts in determining the purpose of a challenged ordinance. This is an objective test based on objective facts, not mindreading. In *Thun* the surrounding facts are discussed at pp. 25-27 of Appellants’ Opening Brief.¹² At a minimum those facts establish a *prima facie* case that (1) a landslide problem didn’t exist, and (2) the existing critical area ordinance furnished more than adequate protection against future problems. Since the ordinance addresses a non-existent problem, a reasonable person must question whether prevention of landslides (harm prevention) is the actual purpose of the ordinance.

Appellants ask only that they be given their day in court to prove that the real purpose of the ordinance was to confer a public benefit (a scenic easement) rather than prevent a public harm (landslides). This does not require the court to second guess the city council, or mind read, but

¹¹ R.P. 67 (Now, here the ordinance really requires nothing of the plaintiffs. They are not required to contribute to a fund. They are not required to develop anything. They are not required to do anything . . .)

¹² They do not rely on the opinion of any council member. The mayor’s declaration simply covers objective facts which can be verified through a number of sources.

only examine the overwhelming evidence which belies the council's statement of purpose. Granted that property rights lack the popular appeal of personal rights, yet our founding fathers treated them equally. Rubber stamping governmental decisions which on their face materially impair those rights is not justified despite claims the government was simply protecting the community at large. Such claims are bogus.

Dated this 5th day of June 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerri Downs, certify that on the 5th day of June 2017, I forwarded a true and correct copy of the foregoing as follows:

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

Dated this 7th day of June, 2017, at Tacoma, WA.


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