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COURT OF APPEALS
DIVISION II

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NO. 49690-9-II
STATE OF WASHINGTON

BY _____
IN THE 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 RESPONDENT CITY OF BONNEY LAKE

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I. INTRODUCTION

The Defendant, City of Bonney Lake (“City”), respectfully requests that this Court affirm the summary judgment dismissal of the lawsuit brought by Appellants Karl and Virginia Thun, the heirs of Thomas Povolka, the trustees of the William and Louise Leslie Revocable Trust, and the trustees of the Virginia Leslie Revocable Trust (“Appellants”). The challenged 2005 zoning decision (hereinafter “Rezone”) was necessary to comply with an order from the State Growth Management Hearings Board (GMHB), and to fulfill the state-law mandate to protect critical areas. The Rezone has now withstood almost 12 years of litigation. Every tribunal—from the GHMB and Pierce County Superior Court, to the Court of Appeals and Supreme Court—has rejected Appellants’ challenges. Most recently, in November of 2016 the Superior Court dismissed Appellants’ inverse condemnation lawsuit, ruling that under Washington State Supreme Court precedent, the Rezone was not a taking as a matter of law. This Court should affirm that ruling.

In the alternative, this Court may affirm the dismissal on the ground that Appellants’ claim is still not ripe for review, because Appellants still have not sought any final government approvals such

as building or subdivision permits, nor have they demonstrated that pursuing final approvals would be futile.

II. RESTATEMENT OF ISSUES

1. Whether the trial court correctly dismissed Appellants' claim on summary judgement where, as a matter of law, the Rezone prevents a harm and does not require Appellants to provide an affirmative public benefit.
2. Whether, as an alternative ground to affirm the superior court's dismissal, Appellants' takings claim is still unripe for review.

III. STATEMENT OF THE CASE¹

A. The September 2005 Rezone

1. **Appellants' property is located on the City's geologically hazardous western slopes.**

Appellants collectively own 36 acres of undeveloped property on the western slopes of the City (hereinafter "Property"). The Rezone converted most of the Property to Residential/Conservation (RC-5) zoning in 2005,

¹ Appellants incorrectly assert that the City admitted all the allegations in their Complaint. Br. of Appellant at 2 n.5 (citing 382-396). The record demonstrates this is not the case. *See* CP 382-396.

In addition, Appellants assert that in 2000, the City "based on a Geotechnical Engineering Study, determined that development of the Thun parcel would pose 'no probable significant environmental impacts.'" Br. of Appellants at 3. The record contains no support for this assertion. There is no evidence that the City ever deliberately or thoughtfully assigned commercial zoning to the Property.

but between five and six acres of the Property retained their commercial (C-2) zoning. The commercial portion of the property occupies a flatter portion of the site abutting State Route 410. CP 39-40.

The Property is located on a network of steep slopes, the stability and developability of which have been a longstanding concern of the City. *See, e.g.*, CP 52. Some City documents refer to this hillside, where the Bonney Lake plateau slopes into the Puyallup River Valley, as “the Bluff.” CP 51-52. The City’s Comprehensive Plan has long characterized the Rezone area as suitable only for low density development because of its topography. CP 58 (quoting from 1964 Comprehensive Plan, “Bonney Lake is surrounded by land that is on slopes exceeding 25 percent. These slopes should be retained in their natural state and will help delineate the urban areas since land having slopes exceeding 15 percent are difficult to develop . . .”).

The Property contains slopes varying in grade from 20-40 percent to severe slopes of 40 percent and higher. CP 49-50. The entire Property is located in a “Potential Landslide Area” according to Pierce County GIS data. CP 49-50. The City’s Comprehensive Plan demonstrates the City’s concern about the stability of the hillside that the Property occupies, calling the slopes “highly dangerous:”

Glaciers, glacial meltwater, and rivers created the Puyallup and Fennel Creek valleys. . .

The soils in the Bonney Lake area are susceptible to landslide at slopes of 15% or more. The slopes bordering the Puyallup valley are highly dangerous because of the steepness of the slope and the presences of unconsolidated glacial materials. Slopes generally collapse when rainstorms oversaturate the soil on the slope.

CP 53. The Comprehensive Plan “illustrates the areas of Bonney Lake with a high and moderate degree of slope instability,” and demonstrates that virtually the entire western border of the City, including the Property, lies in a high landslide risk area. CP 60.

State law requires the City to adopt regulations protecting critical areas, including geologically hazardous areas. RCW 36.70A.060(2); RCW 36.70A.030(9). “Geologically hazardous areas” are defined as “areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.” RCW 36.70A.030(9).

2. The Rezone remedied an illegal inconsistency between the City’s zoning map and Comprehensive Plan.

Even though the Bonney Lake Comprehensive Plan has historically designated most of the Property as “Conservation/Open Space,”² prior to 2005 the Property was zoned Commercial. This was one of the many zoning/planning inconsistencies in the City in the early 2000s. In 2004, the GMHB ordered the City to fix all the inconsistencies. *Jensen v. City of Bonney Lake*, CPSGMHB No. 04-3-0010, at 17-18, 28 (2004); CP 114-150.³ Under the Growth Management Act (GMA), development regulations such as zoning must “be consistent with and implement the comprehensive plan.” RCW 36.70A.130(1)(d). In Bonney Lake, a property that is designated “Conservation/Open Space” in the comprehensive plan must be zoned “Residential/Conservation (RC-5)” or “Public Facilities” (*e.g.*, for park land). CP 43, ¶ 18. A property that is designated “Commercial”

² Appellant Karl Thun was aware of this designation as early as 1999, when he applied for a Comprehensive Plan amendment to change the Property’s designation from Conservation to Residential. The City Council unanimously denied this request. CP 41, ¶ 12.

³ The GMHB ruled:

The City has a duty to maintain consistency between its Plan and regulations that implement its Plan; it may not ignore or delay this requirement and shift the duty to project proponents by ‘entertain[ing] rezones if and when ripe for development.’ [The City] must now amend its development regulations to allow the densities and uses authorized in the Plan and [Future Land Use Map] in order to be consistent with and implement the Plan and FLUM designations

Jensen v. City of Bonney Lake, CPSGMHB No. 04-3-0010 (2004); CP 130.

must be zoned C-1 (Neighborhood Commercial), C-2 (Commercial), Downtown Mixed Use, Downtown Core, Midtown Core, or Easttown. CP 43, ¶ 18.

Following the GMHB's *Jensen* order, the City identified 65 "inconsistency areas" within the City, including but not limited to the Appellants' Property. City staff, the Planning Commission, and the City Council embarked on a multi-month process to remedy the inconsistencies, seeking regular public input along the way. The City sent mailers to affected property owners, hosted "Town Hall" style meetings, and discussed potential rezones at multiple Planning Commission and City Council meetings. *Abbey Road LLC v. City of Bonney Lake*, CPSGMHB Case No. 05-3-0048, at 8 (2006) ("*Abbey Road GMHB*"); CP 151-170. While Appellants' Brief implies that the Rezone was rushed in order to "beat" their development project, the record shows the Appellants had at least nine months' advance notice that a rezone was coming. CP 72, 73.

City staff concluded that the Rezone area would be difficult and expensive to develop at high densities, given the steep slopes, its frontage on State Route 410, and the fact that it is at the edge of the City's utility infrastructure. CP 6-67. Staff therefore concluded that rezoning most of the area to RC-5 would reflect the area's realistic development potential, and

would also comply with the GMA mandates of: (1) reconciling zoning with the Comprehensive Plan, (2) protecting geologically hazardous areas, and (3) preserving an open space corridor between urban areas. *Id.*

The City Council agreed with Staff's determination that RC-5—the purpose of which is to “protect lands containing environmental critical areas and agricultural uses” which “are not suitable for development at urban densities”—was an appropriate zone for the hillside. CP 217; *see also* Bonney Lake Municipal Code (“BLMC”) 18.20.010. Accordingly, the Council unanimously passed Ordinance 1160 at an open public meeting on September 13, 2005. CP 75-77. The Ordinance rezoned 235 acres of the western city limits to RC-5, affecting eight property owners including Appellants. *Id.*; *Abbey Road GMHB* at 15; CP 165. The Ordinance retained 5-6 acres of commercial zoning along the State Route 410 frontage of the Thun property, where the topography flattens out and forms a shelf. CP 77.

Contrary to Appellants' assertion that they are “essentially required to leave almost 99% of their property in open space,” Br. of Appellant at 24, Appellants are free to develop the property in accordance with the C-2 and RC-5 zoning. RC-5 zoning permits one residence per five acres, and allows uses such as adult family homes and day cares, mobile and manufactured homes, museums, private meeting halls, and churches. CP 84-91; CP 80-81.

The RC-5 zone affords the opportunity to build view homes on large lots with amenities like swimming pools (CP 43-44, ¶ 21)—an opportunity that is not available in areas zoned for urban densities of at least 4 to 5 units per acre.⁴ The C-2 zoning on the remaining five to six acres permits a wide variety of uses like apartments, condominiums, townhouses, schools, libraries, theaters, shops, banks, bars, specialty shops, book stores, department stores, and food markets. CP 82-91.

The frequency of unbuildable slopes in the RC-5 portion of the Rezone area will force lower density development regardless of the zoning:

Both the maps and geotechnical data for the site indicate that that development would be substantially constrained by steep slopes. Even if the slopes could be stabilized through engineering techniques, such techniques could be prohibitively expensive and would likely require substantial buffers and setbacks from the undevelopable slopes, forcing low density development on the site. From a planning perspective, you have to consider both upslope and downslope effects. In other words, you have to keep in mind that if a landslide occurred at the bottom of a slope, it could undermine subjacent support for the top of the slope. If a landslide occurred at the top of the slope, earth and debris could impact the bottom of the slope.

CP 40.

⁴ See *LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 98-3-0012 (1999) (low-density development inconsistent with GMA's mandate to designate all land within jurisdiction at appropriate urban densities).

B. The Rezone did not “target” the Appellants’ properties.

The Appellants’ properties comprise only about 15% of the Rezone area. Also within the zone were properties owned by Shipman, Tracy, Manke, Spiketon Heights, and Panorama West. CP 39, 41, 47. Panorama West received development approvals before the Rezone. CP 41. Tracy, Manke, Spiketon Heights, and Shipman “vested” projects by submitting complete applications for subdivision approval prior to the new zone taking effect. *Id.*

Every project in the Rezone area has either failed or encountered significant problems. CP 41 (“Since 2005, none of the developers in the Rezone area . . . have been successful in building low density residential developments, for reasons that are related to topography as well as the access and utility problems caused by proximity to the high-speed, high-volume State Route 410.”) The Shipman, Tracy, Manke, and Spiketon Heights projects all failed to develop, and their applications have now expired. CP 41; CP 189 (Dep. at 30:16-19); CP 190 (Dep. 106-108); CP 192-93 (Dep. 133:3-134:7). Panorama West, to the south of the Property, had already begun to exhibit signs of slope failure and sliding as of 2010. CP 187 (Dep. 19:18-21); CP 188 (Dep. 22:17-20; 24:5-11; 25:13-15); CP 191 (Dep. 127:15-128:13). And Panorama Heights, on the uphill slope from Panorama West,

built around the topography by compressing “shotgun” houses close together under the City’s since-repealed Planned Unit Development ordinance. CP 191 (Dep. 127:1-14).

C. The GMHB upheld the Rezone as a legitimate exercise of the City’s authority and obligations under the GMA.

In November of 2005, Appellants and Abbey Road Group, a development company acting as agents for the Appellants, filed a petition with the GMHB alleging the Rezone violated the Growth Management Act (GMA). Appellants argued that one dwelling per five acres is not acceptable urban density, and that the presence of geologically hazardous areas did not justify the rezone. CP 160-161; *Abbey Road GMHB* at 10-11. The GMHB disagreed, and denied the Petition. CP 167.

The GMHB agreed with the City that the Appellants were belatedly attacking a longstanding Comprehensive Plan designation, and critical areas regulations, that had never been challenged. *Id.* at 10-11; CP 160-161. The GMHB also recognized that by correcting the zoning inconsistency, the City was carrying out the GMHB’s own order in *Jensen*. *Id.* at 14; CP 164. Furthermore, the GMHB concluded the City appropriately used low-density zoning to protect the extensive area of contiguous steep slopes:

Here, 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 hazards.

Id. at 13; CP 163. The GMHB also concluded that the Rezone decision was based on sound science. CP 161 (“[T]he City has demonstrated that BAS [best available science], in the form of its critical areas regulations, steep slope designations and Plan designations, provided the basis for the rezone.”)

Finally, the GMHB ruled against the argument that the Rezone was inconsistent with Goal 6 of the GMA. Goal 6 is in essence a takings clause, providing, “Private property shall not be taken for public use without just compensation having been made.” RCW 36.70A.020(6). In rejecting Appellants’ argument under Goal 6, the GMHB stated:

Goal 6 is not thwarted since the rezoning action includes the western slopes of the City and is not targeted to a few individual parcel owners. There is also significant rationale for the choice of the City to adopt the rezone, it was a reasoned decision. Additionally, the Board notes that the RC-5 zoning designation permits various uses of the property including residential development.

Id. at 13; CP 163. Appellants did not appeal the GMHB’s decision.

D. The Washington Supreme Court found the Appellants had no vested right to build a commercial development.

On September 13, 2005, the same day the Rezone was, after several months of public process, set for final action at the City Council’s open

public meeting, Abbey Road Group submitted a site plan review application for “Sky Ridge,” a condominium project consisting of 24 buildings and 575 units. CP 171.

Under Washington law, submission of a complete building permit application “vests” a project to the zoning in effect at the time of filing. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). Abbey Road submitted an application for site plan approval but not a building permit application. CP 171 (site plan application “is part of a preliminary stage in the development process relative to the building permit application phase.”). The Washington Supreme Court affirmed the decision of this Court that the Sky Ridge project did not vest. *Abbey Road Group v. City of Bonney Lake*, 167 Wn.2d 242, 257-58, 218 P.3d 180 (2009); CP 175. The Supreme Court found that Appellants simply were not ready to proceed with the project before the Rezone took effect. *Id.*

E. The 2008 inverse condemnation lawsuit

In March of 2008, the Appellants filed a complaint alleging inverse condemnation and deprivation of substantive due process. The City moved for summary judgment, arguing the Appellants’ takings claim was not ripe. The superior court granted the City’s motion, and in 2011, this Court affirmed. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 265 P.3d 207

(2011). This Court rejected Thun’s argument that the municipal code provided all the information the Court needed:

[E]ven if we arbitrarily presume that the C-2 portion is exactly seven acres, we have no facts regarding what uses could be made of seven acres of C-2 property in that location. Although we know what the municipal code permits, we have no facts about the character of the land or what kinds of uses might be possible on seven acres. . . [Until] Thun has undergone adequate administrative proceedings to clarify these issues, his case is not ripe.

Thun, 164 Wn. App. at 766-68. The Washington Supreme Court denied Appellants’ petition for review. CP 183.

F. The 2013 Pre-Application Conference

In October of 2013, the Appellants requested a “pre-application conference” with the City to discuss their plan to construct five buildings on the Property, including 96 residential units, 4,000 square feet of retail and 11,700 square feet of office space. CP 45. They also proposed subdividing the RC-5 acreage into three large residential lots. *Id.* A pre-application conference is an optional procedure intended to provide a prospective applicant information about the applicable municipal code provisions. It is not a final government decision. BLMC 14.40.010; CP 45 ¶ 26; CP 93; CP 109.

Based on the preliminary drawings, City staff found the proposed concept to be compliant with the applicable zoning. City staff expressed that

they were “looking forward to working with [Appellants] on [their] project,” and provided information “intended to assist you in preparing plans and materials for a formal application.” CP 109. Staff reminded Appellants that the pre-application conference “does not take the place of the full review that will follow the submission of a complete application.” CP 109.

Despite the seemingly successful pre-application process, the Appellants never submitted applications for any formal approvals such as subdivision or building permits. Instead, they filed another lawsuit.

G. The Current Lawsuit

The 2016 Complaint is nearly identical to the Complaint filed eight years earlier; it alleges the Rezone is a taking without just compensation in violation of Article I, § 16 of the Washington Constitution. CP 4. It does not allege a taking under the U.S. Constitution, nor does it advance a substantive due process claim.

The City again moved for summary judgment, arguing that the case was still not ripe for review, and that the Rezone was not a taking as a matter of law. CP 13-37. The superior court concluded the case was ripe, reasoning that the 2013 pre-application conference materials gave the Court “a reasonable idea of what can be done.” VRP 65-66. However, the Court granted the City’s Motion on the merits, finding that the Rezone did not

destroy any fundamental attribute of property ownership (VRP 67), and that:

[The ordinance] does not seek to impose on those regulated the requirement of providing an affirmative public benefit. Its primary goal is public health and safety. The Growth Management Hearing Board told [the City] to re-examine their comp. plan and zoning . . . [I]t seems to me the City made a decision, certainly up to their discretion, to do the rezone.

VRP 67-69. The Court commented that second-guessing a local government’s discretionary zoning decision would create a “slippery slope,” and on that basis declined to find an issue of fact as to the City Council’s motives. VRP 64-65, 68 (“[Appellants] think I should look behind the ordinance to the motives, read the mind of the city council. One potential problem with that is, every zoning action every city does, at least potentially, is going to end up in trial.”)

IV. ARGUMENT

A. The Washington takings analysis.

Under the Washington takings analysis, the court asks two “threshold questions” to determine if a plaintiff can advance a takings challenge. *Guimont v. Clarke*, 121 Wn.2d 586, 594-95, 854 P.2d 1 (1993). First, the court asks whether the regulation denies the owner “a fundamental attribute of ownership,” such as the right to possess, exclude

others, dispose of, or make some economically viable use of the property. *Id.* at 600-02. If the answer to the first threshold question is no, the court proceeds to the second “threshold inquiry.” *Id.* at 601. The Court asks:

whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.

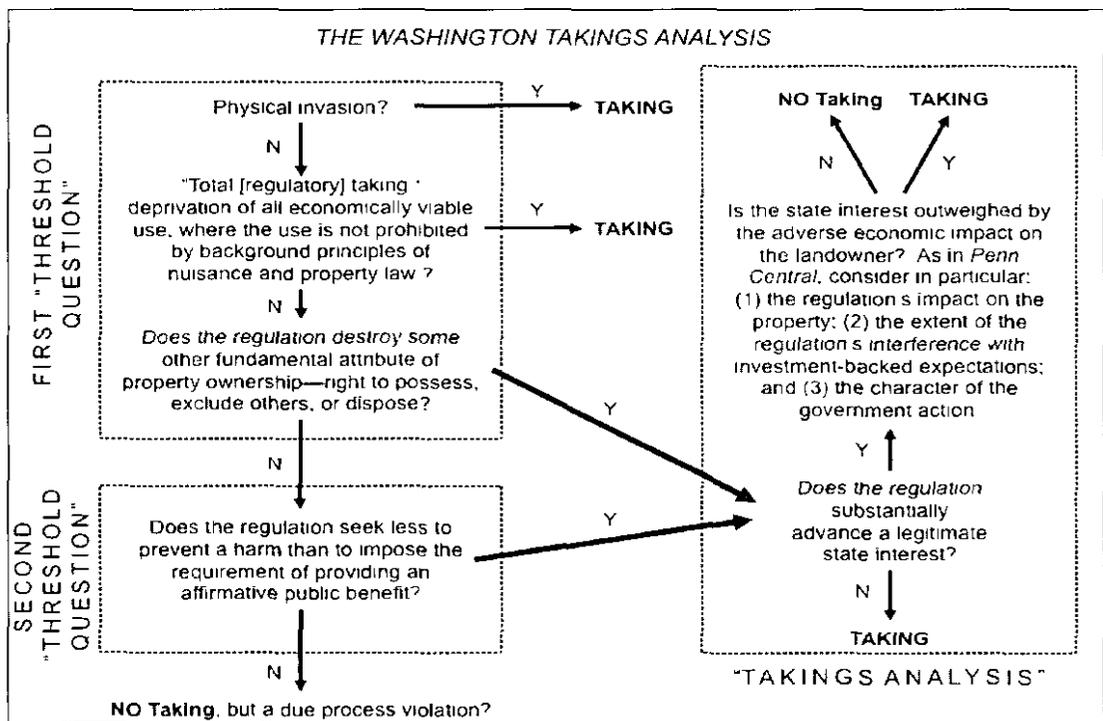
Id. at 601, 603 (internal citation and quotation omitted). If the claimant fails to establish one of these threshold questions, the takings claim fails as a matter of law. *Robinson v. City of Seattle*, 119 Wn.2d 34, 50, 830 P.2d 318 (1992); *Guimont*, 121 Wn.2d at 601, 603; *Paradise Inc. v. Pierce Cnty.*, 124 Wn. App. 759, 768, 102 P.3d 173 (2004).

If at least one of the threshold questions has been answered in the affirmative, the Court proceeds with the remainder of the takings analysis, asking first whether the regulation substantially advances a legitimate state interest. *Guimont*, 121 Wn.2d at 604. If the regulation fails to advance such an interest, it constitutes a taking. *Id.*⁵ If the regulation does advance a

⁵ The United States Supreme Court has eliminated the test regarding whether a regulation substantially advances a legitimate state interest. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 529, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). The effect of this decision on Washington takings law is uncertain. *See Thun*, 164 Wn. App at 760 n.4 (stating that the effect of the *Lingle* decision on takings claim under the Washington Constitution is “yet undecided”). Because Appellants’ claim fails the threshold questions, the court need not address this open legal question.

legitimate state interest, then the court performs a balancing test in which it 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.” *Id.* at 604; *see also Penn Central Transportation v. New York City*, 438 U.S. 104, 99 S.Ct., 58 L. Ed. 198 (1978).

The threshold questions and analysis for a Washington inverse condemnation claim are visually summarized as follows:



Roger Wynne, *The Path Out Of The Takings Quagmire: The Case for Adopting The Federal Takings Analysis*, 86 WASH. L. REV. 125, 135 (2011).

Appellants do not contend that they have lost all economically viable use of their property. CP 244. Instead, Appellants focus on the second “threshold question,” arguing that the rezone seeks less to prevent a harm than to require an affirmative public benefit, and that a factual dispute over the City Council’s motives precludes summary judgment. This logic is inconsistent with Washington law.

1. The Rezone seeks to prevent a harm, and does not require Appellants to provide an “affirmative public benefit.”

Zoning ordinances are fundamentally “harm preventing” rather than “benefit conferring.” “[Z]oning ordinances are constitutional in principle as a valid exercise of the police power.” *Open Door Baptist Church v. Clark Cnty.*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000); WASH. CONST. ART. XI, § 11 (municipal police power). Zoning ordinances that are designed to protect the environment are *especially* harm-preventing. In *Robinson*, the Supreme Court stated:

We would distinguish our threshold determination in this case, however, from that which may result when the development of a particular piece of property would cause direct harm to the environment, such as the destruction of an irreplaceable wetland or shoreline ecosystem.

Robinson, 119 Wn.2d at 53; *see also Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 337, 787 P.2d 907 (1990) (assuming that ordinance protecting wetland was harm preventing rather than benefit conferring).

Limiting development on steep slopes prevents the environmental harms of landslides and erosion. RCW 36.70A.030(9). The record firmly establishes that the 235 acre Rezone area contains a significant network of geologically hazardous areas. *See* BLMC 16.28.010; CP 49-60; CP 151-170; CP 163. Moreover, the zoning reflects the reality of what can actually be built on the slope, which the failures and problems encountered by projects in the Rezone area have borne out. CP 40-41. Accordingly, the Rezone achieves a police power purpose (development regulation) and prevents environmental harms (erosion and landslides), and is not a taking as a matter of law.

2. The rezone does not force the provision of an “affirmative public benefit.”

Appellants dismiss the City’s police power authority and mandate to prevent environment harm, arguing that the City’s primary motive—to establish a “view easement” for the public—effects a taking. The record does not support that assertion.⁶ Even if it did, no precedent establishes that a “view easement” is an unconstitutional public benefit.

The Courts have found an unconstitutional public benefit only where a regulation requires property owners to do something extraordinary,

⁶ The record undercuts the argument that the City’s primary motive was to preserve a view along the SR 410 corridor. The City’s zoning map allows commercial development on *both* sides of SR 410’s frontage, including the remaining commercial portion of Appellants’ Property. CP 47-48 (zoning map showing C-2 commercial zoning in red).

like pay for housing units. In *Sintra v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992), and *Robinson*, property owners challenged the enforcement of the Housing Preservation Ordinance, which required landowners to pay a fee or replace rental units before removing or demolishing low income units “to mitigate the loss of low income housing . . . and reduce the hardships experienced by displaced tenants.” *Robinson*, 119 Wn.2d at 41, 53; *Sintra*, 119 Wn.2d at 15. Analyzing the case under the same takings analysis that applies here, the Court stated:

The harm sought to be prevented—people standing on the street corner with nowhere to go—was exceeded. The regulation required the improper additional step of providing new housing . . . This ‘goes beyond preventing a public harm.’

Sintra, 119 Wn.2d at 15; *see also Robinson*, 119 Wn. 2d at 53.

Rezoning a hillside to comply with state environmental protection mandates, and with a direct order of the GMHB, is a far cry from forcing Appellants to pay for housing units. The City has not compelled the Appellants to pay into a fund to prevent landslides, or to stabilize hillsides elsewhere as mitigation for development. This case therefore does not present the extraordinary facts required to trigger the second threshold question.

Furthermore, a desire to preserve an aesthetic component of the

environment, such as a view, does not constitute a taking. *See, e.g., State Dep't of Ecology v. Pacesetter Const. Co., Inc.*, 89 Wn.2d 203, 571 P.2d 196 (1977) (“Many cases hold protection of aesthetic values alone justify the exercise of police power without payment of compensation.”) (collecting cases); *Conner v. City of Seattle*, 153 Wn. App. 673, 678-69, 223 P.3d 1201 (2009) (landmark preservation law was harm preventing, and not a taking).

Finally, the trial court correctly determined that it is impossible to divorce an interest in preserving a view from the fact that geologically hazardous areas exist in the view area. VRP 68. The very reason a “magnificent entry” exists at all is because one must drive up a steep hill to get to the top of the Bonney Lake plateau. CP 66, 248. Accordingly, the trial court correctly characterized the City’s view interest as “incidental.”

3. Appellants have not created an “issue of fact” capable of defeating summary judgment.

Appellants argue that genuine issues of material fact as to the purpose of the ordinance preclude summary judgment. Such an argument disrespects the court’s strong gate-keeping role in inverse condemnation cases. Under the Washington takings analysis, the two threshold questions are questions of law for the court to decide. *Paradise Inc.*, 124 Wn. App. at 768 (threshold questions “are legal questions to be decided by a court, not by a jury”); *see also Jones v. King Cnty.*, 74 Wn. App. 467, 469, 478, 874 P.2d

853 (1994) (affirming summary judgment after concluding that the property owner's takings claim did not pass either of the threshold requirements); *Schreiner Farms, Inc. v. Smith*, 87 Wn. App. 27, 38, 940 P.2d 274 (1997) (same).

Even in cases where the purpose of the government regulation was disputed, courts have rejected takings claims as a matter of law. *Kahuna Land Co. v. Spokane Cnty.*, 94 Wn. App. 836, 974 P.2d 1249 (1999) (conditions imposed did not impermissibly benefit public); *Jones*, 74 Wn. App. at 478 (down-zoning did not impermissibly benefit public or Renton aquifer); *Fedmay Marketplace West LLC v. State*, 183 Wn. App. 860, 875, 336 P.3d 615 (2014) (purpose which "lies at the heart of the State's police power" prevented public harm).

Courts take a strong role in takings claims because the purpose of the second threshold inquiry is to spare municipalities from having to defend lawsuits every time local land use legislation affects property values. *Sintra*, 119 Wn.2d at 15 ("The threshold test is designed to prevent undue chilling on legislative bodies' attempts to properly and carefully structure land use regulations which prevent public harms.") Washington courts have repeatedly expressed an unwillingness to make it too difficult or expensive for local governments to discharge their core duty of regulating land uses.

See, e.g., Orion Corp. v. State, 109 Wn.2d 621, 649, 747 P.2d 1062 (1987) (expressing concern that “specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems.”). In *Presbytery*, the Supreme Court feared “intimidation” could eliminate environmental protections altogether:

If local governments in the past had thought that enactment of a land use regulation might result in monetary awards, then very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked.

Presbytery, 114 Wn.2d at 332.

In this case, the trial court appropriately recognized that denying summary judgment in cases like this would create a “slippery slope,” with each and every zoning ordinance that impacted property values potentially ending up in trial. VRP 64-65, 68. One notable commentator echoed this concern: “Of course it is a truism that zoning that reduces value or that deprives an owner of his highest and best use cannot necessarily be a taking; all zoning, if it has any effect at all, deprives land of its highest and best use.” 17 William B. Stoebuck, John W. Weaver, WASHINGTON PRACTICE, REAL ESTATE sec. 4.9, at 203-04 (2d ed.).

4. **The superior court did not “conflate” the threshold question.**

Appellants’ assertion that the superior court erroneously conflated the standard for exactions with the standard for a regulatory taking is incorrect. Br. of Appellant at 22. The superior court correctly identified the standard to be applied for a Washington regulatory takings claim, quoting directly from the case law. VRP 67-69. Appellants admit the harm/benefit threshold inquiry applies. Br. of Appellant at 19 (“Nonetheless, the requirement is still part of Washington Takings law”). This case does not involve an exaction of money from Appellants, or a requirement that Appellants set aside some portion of the Property as entirely undeveloped open space. *See Sintra*, 119 Wn.2d at 16 n.7 (noting housing ordinance was not an exaction case, and applying threshold questions rather than *Nollan* nexus test). It is squarely a regulatory takings case, and as such, the standard set forth in *Guimont v. Clarke* applies. *Thun*, 164 Wn. App. at 759-61 (citing *Guimont* as authority for takings analysis).

Appellant is incorrect in analogizing the instant case to *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1999), *aff’d on alternate grounds*, 146 Wn.2d 740 (2002) . Br. of Appellant at 23. *Isla Verde* was not a zoning case; rather, the developer challenged a requirement to dedicate a flat 30 percent of a proposed subdivision to remain in a “natural

and undisturbed state.” *Id.* at 138-39. . The court found that the city had not “made an individualized determination that this condition is necessary to mitigate an impact of this development,” nor “demonstrated a need for any additional open space within the city limits . . . which need arises because of this development.” *Id.* at 132. Accordingly, the exaction was unconstitutional and a “tax” on development in violation of RCW 82.020.020.

Here, the City has not exacted an open space set aside from a development; it has zoned raw land in accordance with the Comprehensive Plan and the land’s topographical conditions. As the GMHB already ruled, the City made an individualized determination, based on Best Available Science, that low density zoning was the best fit for the Property. *Isla Verde* is inapplicable.

5. Appellants’ claim fails the remainder of the takings analysis.

Because Appellants’ claim fails both threshold inquiries, the superior court correctly dismissed it. Nonetheless, the Appellants claim would fail even if this court proceeded further with its analysis. *See* CP 36 n.7, CP 31 n.6 (argument in trial court). The rezone clearly advances a legitimate state interest. *See Girton v. City of Seattle*, 97 Wn. App. 360, 364, 983 P.2d 1135 (1999) (“steep slope ordinance is aimed at achieving the

legitimate public purpose of preventing the harms caused by soil erosion”). And the character of the government action here—zoning to prevent environmental harm—necessitates a conclusion that no taking occurred. *William C. Haas & Co. v. City and Cnty. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (no taking where rezone “do[es] not prevent Haas from developing the property, even though the planned development cannot be undertaken.”); *Maple Leaf Investors v. State Dep’t of Ecology*, 88 Wn.2d 726, 734, 565 P.2d 1162 (1977) (prohibiting development on seventy percent of the plaintiff’s property within a floodway channel was not a taking where development of the remaining thirty percent of the land was not restricted); *City of Virginia Beach v. Virginia Land Inv. Ass’n No. 1*, 239 Va. 412, 416, 389 S.E.2d 312, 314 (1990) (downzoning planned unit development to agricultural land did not deprive all economically viable use of property where plaintiffs could still lease land); *Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 425 (7th Cir. 2011) (downzone from commercial to residential not a taking because plaintiff “retains full use of his property for agricultural and residential purposes” and was not denied “all or substantially all practical uses of the property”).

B. This Court may also affirm dismissal on the alternate ground that the Appellants' takings claim is unripe for review.

In the alternative, this Court may affirm the grant of summary judgment on the ground that the Appellants' takings claim is not ripe for review. Washington case law requires a final government decision as a prerequisite to ripeness, and Appellants have failed to establish that pursuing a final decision would be futile.

1. Appellants' claim remains unripe.

While Appellants argued below that ripeness is merely a "prudential" rather than "jurisdictional" bar in state court, Washington courts have consistently dismissed takings claims on ripeness grounds. That the superior court has subject matter jurisdiction over the claim does not alter the fact that Washington courts have consistently and strictly enforced the rule requiring a final government decision before plaintiffs may advance takings claims.

Ripeness presents a question of law for the court. *Ventures NW v. State*, 81 Wn. App. 363, 368, 914 P.2d 1180 (1996); *Sintra*, 119 Wn.2d at 19 n.10. "Courts cannot address inverse condemnation claims in a vacuum." *Estate of Friedman v. Pierce Cnty.*, 112 Wn.2d 68, 80, 768 P.2d 462 (1989). The Fifth Amendment prohibits only regulations that go "too far," and a court "cannot determine whether a regulation has gone 'too far' unless it

knows how far the regulation goes.” *MacDonald, Sommer, & Frates v. Yolo Cnty.*, 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986).

A “challenge involving application of a regulation to a specific piece of property is not ripe for adjudication until the property owner exhausts all administrative remedies.” *Ventures NW*, 81 Wn. App. at 364; *Presbytery*, 114 Wn.2d at 338 (“[A] final governmental decision as to permitted uses of land is generally a condition precedent to resolution of an inverse condemnation claim.”) Where there is some uncertainty about how the challenged regulations apply to the property, the U.S. Supreme Court has “repeatedly found the ‘final decision’ requirement not satisfied.” *Thun*, 164 Wn. App. at 763 (citing *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-34, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997)).

Courts have consistently required plaintiffs advancing takings claims to go through the process of getting development approvals. In *Presbytery*, the Washington Supreme Court dismissed a takings challenge to a wetlands preservation ordinance as unripe because the developer had not applied for a building permit.

Because the landowner has not as yet sought any development permits, it is not possible to know what effect SEPA and other applicable regulations might have on the property in question. . . . [W]ithout engaging in the application process, there is no way to know what beneficial

use may be made of Presbytery's property, nor any way to know what deprivation of beneficial use was proximately caused by the Hylebos Wetland Ordinance.

Presbytery, 114 Wn.2d at 339. See also *Saddle Mtn. v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004) (challenge to rezone of parcel not ripe absent final government decision applying the zoning regulations to the site); *Bellevue 120th Assocs. v. City of Bellevue*, 65 Wn. App. 594, 892 P.2d 182 (1992) (refusing to "assume the outcome of the administrative process" and holding takings claim unripe).

Moreover, a case may be unripe for review when the development costs are unknown or speculative. In *Asarco Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2002), the Washington Supreme Court concluded a takings claim was unripe where Ecology had not yet issued a clean-up order for Asarco's site under the Model Toxics Control Act, ch. 70.105D RCW. The Court held:

Asarco presents us with a justiciability challenge conundrum; while this is an 'as applied' challenge, nothing has been applied. The mere convenience to Asarco of deciding the controversy ahead of Ecology's clean up order is not enough to ripen the claim . . .

We have no record to determine what level of clean up might be reasonable. We have nothing in the record but speculation as to how much the clean up might cost.

Id. at 760-61.

This Court, ruling on this case in 2011, rejected the contention that the applicable zoning codes provided the Court with all the necessary information to adjudicate a takings claim. *Thun*, 164 Wn. App. 766-68. In affirming dismissal of the claims, this Court noted an absence of “facts about the character of the land or what uses might be possible,” and ruled that Thun’s claim would be unripe until he had undergone “adequate administrative proceedings to clarify these issues.” *Id.* at 766-67.

Appellants still have not applied for or obtained development permits under the current zoning, nor have they obtained any final government decision regarding their property. All they have done is create a conceptual drawing and discuss it with City staff. The City’s response—an advisory letter providing guidance for applying for approvals for the conceptual project—is not a “final decision” that renders a takings claim ripe. *Bellevue*, 65 Wn. App. at 600.

2. Appellants have not established that applying for development permits would be futile.

Appellants likewise have not established that applying for development permits would be futile. “Once exhaustion is raised as a defense, the landowner seeking to establish ‘futility’ as an exception to the exhaustion requirement must persuade the court that futility excuses exhaustion.” *Presbytery*, 114 Wn.2d at 338 (establishing futility “is a

substantial burden because of the strong public policies favoring the exhaustion doctrine” and will only be established in “the uncommon case”).

While Appellants contend “the cost of proceeding further would be prohibitive,” Br. of Appellant at 7, the cost of applying for development permits does not establish futility. *Bellevue 120th Assocs.*, 65 Wn. App. at 601 (rejecting plaintiff’s request to shortcut a perceived costly and “useless” administrative process). Our state supreme court has stated,

[F]actual futility will be found only rarely and on unusual facts. Generally speaking, if a plat application, application for a conditional use permit or variance, or other administrative procedure could result in a decision resulting in beneficial use of the land, factual futility should not be found.

Estate of Friedman, 112 Wn.2d at 80-81 (emphasis added). In *Friedman*, the Washington Supreme Court held a landowner had not established futility where the County was willing to consider its proposals. *Id.* at 81. Likewise, here the record demonstrates that the City remains willing to process Plaintiffs’ proposals. CP 109. According to dozens of cases establishing justiciability of takings claims, Appellants’ claim still is not ripe; this Court may affirm dismissal on this alternative ground.

V. CONCLUSION

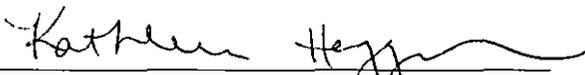
For the past 12 years, courts and administrative bodies have

consistently rejected arguments against the City's 2005 Rezone. The foregoing tribunals have found that the Rezone was consistent with the GMA and supported by Best Available Science, that the Appellants did not have a vested right to develop the property at commercial densities, and that Appellants cannot sue the City for a taking without having sought a final government decision on development approvals. Appellants' takings claim has now been dismissed on the merits.

This Court should affirm the dismissal because the Rezone was a fundamental exercise of the municipal police power, intended to safeguard the environment; as such, it was not a taking of Appellants' property. A conclusion to the contrary would contravene the purpose of the Washington takings analysis, as articulated by the Washington Supreme Court: to protect municipalities from the specter of financial liability when they must make tough decisions concerning protection of their communities and the environment.

RESPECTFULLY SUBMITTED this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of
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Dated this 5th day of May, 2017.



By: Cynthia Nelson, Legal Assistant