No. 73409-1-I

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

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KINDERACE, LLC,
a Washington limited liability corporation,

Appellant,

v.

CITY OF SAMMAMISH,
a Washington municipal corporation,

Respondent.

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On Appeal from the Superior Court of the
State of Washington for King County
No. 13-2-23271-5 SEA

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# APPELLANT'S OPENING BRIEF

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## INTRODUCTION

This is a "regulatory taking" case based on denial of "all economically viable use" of a discrete legal parcel. The parcel owned by Kinderace, LLC, fronts on a major thoroughfare in the City of Sammamish, is zoned for commercial use, and is surrounded by existing development. Nevertheless, the City regulations require that the parcel be left entirely undeveloped and vacant. This is because in 2006, the City imposed more restrictive development regulations to protect environmentally critical areas—here, a stream, wetlands, and their designated buffers. Kinderace applied for a Reasonable Use Exception (RUE) to allow minimum commercial development, but that application was denied. The result is a regulatory taking of the parcel, because no economically viable use is allowed.

## ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of October 22, 2014, affirming the decision of the Sammamish Hearing Examiner, dated January 31, 2014 (including the Hearing Examiner Conclusions of Law 1 - 10).

2. The trial court erred in entering the order of March 24, 2015, granting the City of Sammamish's Motion for Summary Judgment, thereby ruling that the City is not liable for a regulatory taking.

3. The trial court erred in entering the order of March 24, 2015, denying Kinderace's motion for partial summary judgment on its regulatory taking claim.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Where a boundary line adjustment establishes a single parcel as a discrete and separate legal lot, and that parcel is denied all economically viable use, can a regulatory taking be avoided on the basis that a prior configuration of the lot included additional land that was used to facilitate development of a separate adjoining lot?

## STATEMENT OF THE CASE

### A. The Subject Property

Kinderace owns fee simple title to a legal lot in the City of Sammamish, taxed as King County Tax Parcel No. 342506-9032, or simply Parcel 9032. Clerk's Papers (CP) 1, CP 2008 (Verification of Complaint). This parcel in its current configuration was created by a boundary line adjustment that was reviewed and approved by the City in 2008. CP 1787.

The parcel is zoned for commercial uses. CP 2. Its total size is 32,850 square feet, or approximately three-quarters of an acre. CP 2:7, CP 1782. The parcel is undeveloped. CP 1784.

The Kinderace Parcel 9032 fronts on the east side of 228th Avenue, NE, which is the major north/south thoroughfare in the City of Sammamish. All of the surrounding parcels are developed. A Starbucks and a three-story bank building are located to the north on Parcel 9039 (at the corner of 228th

Avenue and 4th Street, NE). A child care center and a KFC/Taco Bell fast food restaurant is located adjacent to the east on Parcel 9058. On the south side, the City owns Parcel 9053 which is developed with a storm water detention pond. CP 1905 and 1907 (graphics showing surrounding development), 1782.

A stream known as George Davis Creek flows through the Kinderace parcel along its northern boundary line. The stream flows westerly, and after exiting Parcel 9032 it flows through a culvert underneath 228th Avenue. CP 1784, 1914. There is also a nearby wetland that has 215-foot buffers that encroach fully into the Kinderace parcel. CP 1784. Because of the creek and wetland buffers, the entire Parcel 9032 is designated as an environmentally critical area. CP 1785.

There is no dispute that the entirety of Parcel 9032 is encumbered by critical areas and their buffers. The City code allows buffer reductions, but even assuming the maximum buffer reduction allowed under the code (50 percent reduction), Parcel 9032 would still only have a total of 83 square feet of developable land. CP 1789. And even that minuscule area is just a sliver of land on a portion of the south boundary. The City does not dispute that the 83 square feet of developable land presents no opportunity for reasonable economic use of any sort. The undisputed testimony of Kinderace principal

Elliott Severson states:

> [E]ven with a 50 % reduction of the buffers, there would only be a sliver of land (about 30 feet long by five feet wide) outside the reduced buffers, and that sliver is clearly too small for any development. Thus, the City's buffer regulations preclude all development of the site.

CP 3:15-18.

**B. The Application for a Reasonable Use Exception**

Because 83 square feet (not even the size of a small bedroom) is far too small for any development or economic use, Kinderace applied for a Reasonable Use Exception (RUE). Kinderace initially sought approval for an Ace Hardware store. That project had substantial community support and Kinderace expended $100,000 in pre-development costs. CP 4:16-18. But the City resisted the Ace Hardware proposal, so Kinderace scaled back and instead proposed a Pagliacci Pizza Restaurant. CP 1780.

The RUE application included a detailed economic analysis to show that the pizza restaurant represented the minimum financially feasible project. CP 1810 (citing AR 684-693). Being sensitive to environmental concerns, the site plan was designed to minimize environmental impacts by avoiding any disturbance to the on-site stream and wetland, and to maintain a minimum 25-foot undisturbed buffer from the stream. CP 1916. The total site disturbance would only be 36 percent. CP 1916, 1917. In addition, the

City's environmental expert indicated that any buffer impacts could be mitigated. The City's environmental expert explained:

> There are a variety of approaches that could be taken that could constitute compensatory mitigation for the proposed impacts.

CP 895. The City's expert report went on to discuss various mitigation options. *Id.*

The RUE is authorized under Sammamish Municipal Code (SMC) 21A.50.070(2). The provision allows alterations to critical areas and buffers to allow a reasonable use if application of the restrictions would otherwise deny all reasonable use of the property.

The term "reasonable use" is defined in the City code as "a **legal concept** articulated by federal and state courts in regulatory taking cases." SMC 21A.15.950 (emphasis added). As a legal concept, this case turns on the interpretation of federal and state regulatory takings law.

**C. The Basis for the City's Denial of the RUE**

Prior to the 2008 boundary line adjustment, the predecessor version of Parcel 9032 was larger and included additional land on the north side of George Davis Creek. That additional land was approximately 17,000 square feet of area and was positioned adjacent to Parcel 9058. CP 1905, 1907.

In 2003, Parcel 9058 was being analyzed by SR Development, LLC,

for development of a child care facility and KFC/Taco Bell fast food restaurant. However, it was determined that in order to construct two commercial buildings on that parcel, additional area would be needed for a required storm water detention pond. CP 1786.

One of the principal owners of SR Development was Elliott Severson, who is also a principal owner of Kinderace. In 2003, Severson acquired an option to purchase Parcel 9032. Rather than place the needed stormwater pond on Parcel 9058, he proposed to locate the detention pond on Parcel 9032 in the area north of George Davis Creek. CP 1786. His intention always was to reserve the area south of the creek for future development.

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

CP 2153, ¶ 16 (Declaration of Elliott Severson).

In 2004, the City approved the KFC/Taco Bell and child care facility application. Severson completed the purchase of parcel 9032, and the project

moved forward. Both commercial buildings were completed and the storm water detention pond was constructed on that portion of Parcel 9032 north of the creek. CP 1787.

Severson testified that a boundary line adjustment to transfer the area north of the creek into Parcel 9058 was part of the plan from the beginning. The boundary line adjustment would connect the storm water pond with the project it served.

> The intention the entire time was that the detention pond would go with Parcel 9058 since it was the commercial development on Parcel 9058 that was actually using the pond. However, the city had not added any condition to effectuate this result, and we neglected to process a boundary line adjustment. But, we also did not grant Plateau Associates an easement because our intention was to deed them the portion of the land north of the Creek where the pond was located. We also received no rent from Plateau Associates for using Parcel 9032 because again the intention was to transfer the pond to 9058 for no consideration.

CP 2155, lines 7 - 14 (Decl. of Severson).

Eventually, in 2008, Severson did file the application for a boundary line adjustment between Parcels 9032 and 9058. CP 1787. That application was approved on December 17, 2008, and recorded on January 21, 2009. *Id.* A warranty deed transferring the portion of 9032 to the owner of 9058 was also recorded on January 21, 2009. *Id.*

Given this background, the City determined that the detention pond north of the creek on the **former** Parcel 9032 (pre-BLA) provided reasonable use sufficient to deny the RUE application. Similarly, the trial court ruled that use of the area north of the creek for a detention pond was a joint development with Parcel 9058 and therefore was sufficient use to avoid a regulatory taking despite denial of all economically viable use of the **present** Parcel 9032. CP 2398.

The procural history is straightforward. After denial of the RUE by the Hearing Examiner, Kinderace sought judicial review under the Land Use Petition Act. Kinderace also filed a Complaint for a regulatory taking which was consolidated with the LUPA action. On cross motions for summary judgment, the trial court affirmed the denial of the RUE, and ruled there was no regulatory taking of the present Parcel 9032. This appeal followed.

## ARGUMENT

## I

## PARCEL 9032 HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE AND THEREFORE A REGULATORY TAKING HAS OCCURRED

### A. Standard of Review

Kinderace's regulatory takings claim was denied on summary judgment granted to the City. On appeal of summary judgment, the standard

of review is *de novo*, and the court performs the same inquiry as the trial court. *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 264, 268 P.3d 958 (2011).

### B. A Regulatory Taking Is Categorically Established Where Government Denies All Economically Viable Use of the Subject Property

It is well established by the United States Supreme Court and Washington courts that a taking categorically occurs where there has been a denial of all economically viable use of the property. The leading case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), which held:

> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

*Id.* at 1015. The Court continued:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

*Id.* at 1019.

Washington follows the *Lucas* rule, as clearly stated by Division I of the Court of Appeals shortly after *Lucas* was decided:

> In our view, *Lucas* mandates compensation for a taking whenever land use restrictions deny a landowner of all

> economically viable use of his property, unless the restriction is one that background principles of this State's law of property and nuisance already place upon ownership.

*Powers v. Skagit County*, 67 Wn. App. 180, 190, 835 P.2d 230 (1992).

The next year, the Washington Supreme Court incorporated the *Lucas* rule into state takings law. *Guimont v. Clarke*, 121 Wn.2d 586, 600, 854 P.2d 1 (1993) ("in light of *Lucas*" a plaintiff proves a "categorical" taking if the regulations deny "all economically beneficial use of the property"). *See also Sparks v. Douglas County*, 127 Wn.2d 901, 908, 904 P.2d 738 (1995) (taking occurs where regulations "deprive the owner of economically viable use of the owner's land"); *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 612 n.28, 124 P.3d 324 (2005) (taking occurs where a regulation denies a landowner " 'all economically beneficial or productive use of land' ") (quoting *Guimont*, 121 Wn. 2d at 598).

If this test is applied to the present configuration of parcel 9032, there should be no doubt that a categorical taking has occurred. As stated by the Hearing Examiner, the parties at least agree that

> Even if the proposal qualified for the maximum buffer width reductions allowed under current regulations, the developable area of Post-BLA Parcel 9032 would be 83 SF or less.

CP 1789. Such a small area cannot support any economically viable use, and the City does not contend otherwise.

### C. The Relevant Parcel for Takings Analysis Purposes Is the Present Parcel 9032

#### 1. The Approval of the Boundary Line Adjustment Created a Discrete and Separate New Legal Lot That Was Not Part of Any Joint Development

The authority for a boundary line adjustment is RCW 58.17.040(6). A boundary line adjustment is actually a replatting or redivision of lot lines, but it is accomplished without going through the formal subdivision process. For this reason, a boundary line adjustment is considered an "exemption" to the formal and complex requirements of the Subdivision Map Act, RCW Ch. 58.17. Under the state law, the exemption to allow adjustment of boundary lines must not create any lot which "contains insufficient area and dimension to meet minimum requirements for width and area for a building site." RCW 58.17.040(6).

Under Washington law, the approval of a BLA creates a new **legal lot**. In *City of Seattle v. Crispin*, 149 Wn.2d 896, 71 P.3d 208 (2003), the property owner asserted that a boundary line adjustment results in legal lots:

> Crispin asserts that, because tax lot 164 was a division made for the purpose of alteration by adjusting boundary lines and did not create additional lots, it is exempt from the requirements of chapter 58.17 RCW governing land division, which the City's ordinance mirrors, **and is, thus, a legal lot**.

*Id.* at 902 (emphasis added). The Supreme Court agreed: "Tax lot 164 is a **legally created lot** with the statutory exemption under RCW 58.17.040(6)." *Id.* at 905 (emphasis added).

*Crispin* applies here. Because the current Parcel 9032 was created through an approved BLA, it is a legal lot.

Significantly, while a portion of the old Parcel 9032 may have been used for joint development with Parcel 9058 (the area north of the creek), there is **no portion** of the new Parcel 9032 that was ever used to jointly develop Parcel 9058. Not one square foot of the new Parcel 9032 was used in conjunction with the development of Parcel 9058. Accordingly, the trial court erred in ruling that the current Parcel 9032 was used in a joint development with Parcel 9058. Indeed, such a conclusion is an impossibility because the new Parcel 9032 (which is limited to the area south of the creek) did not even exist as a legal parcel in 2004 when Parcel 9058 was developed. The trial court's conclusion that the current Parcel 9032 was used as a joint development should be reversed as a matter of law.

### 2. Kinderace Has a Fundamental Right to Economically Beneficial Use of New Parcel 9032

As a legal lot, current Parcel 9032 carries all the fundamental attributes of property ownership. In addition to the right to possess, the right to exclude others, and the right to dispose of property, another fundamental

attribute of ownership is the right to make some economically beneficial use.

> In light of *Lucas*, another "fundamental attribute" of property appears to be the right to make *some* economically viable use of the property.

*Guimont*, 121 Wn.2d at 602 (italics by the Court). In short, the approval of the BLA created a new legal lot that carries with it the right to some economically viable use. By denial of the reasonable use exception, that fundamental right has been extinguished and the result is a taking.

### 3. The City Is Precluded from Attacking the Finality of the Approved BLA

If the City had any legitimate grounds to declare that the reconfigured Parcel 9032 was not a legal lot with normal rights of use and development, *then the BLA should not have been approved.* For example, if the City believed that the old Parcel 9032 was included as a joint development with Parcel 9058, that may have been a legitimate reason to deny the BLA. *But the City did not deny the BLA.*

Nor does the City argue that the BLA was improperly approved. Of course, it is far too late to make that argument. The Washington Supreme Court has made it clear that BLA decisions are land use decisions that are entitled to finality unless timely challenged under LUPA. *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

> Under *Wenatchee Sportsmen Association*, approval of the BLA in this case, despite its questionable legality, "became valid once the opportunity to challenge it passed."

*Id.*, at 925-26 (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000)). Of course, even though the BLA in *Nykreim* was of "questionable legality," that concern did not override the strong policy of finality in land use decisions. In contrast, there is no assertion by the City that Kinderace's BLA was of questionable legality. Nor would it matter if it did. The Washington Supreme Court in *Nykreim* underscored the "strong public policy supporting administrative finality in land use decisions" (*Nykreim*, 146 Wn.2d at 931) and that "land use decisions from this court emphasize the need for property owners to rely on an agency's determinations with reasonable certainty." *Id.* at 933.

This policy of finality is directly undermined by the trial court decision. The City approved the BLA in 2008, creating a newly configured and legal Parcel 9032. Subsequent to that approval, Severson expended $100,000 seeking approval of the Ace Hardware proposal, and then additional money and time pursuing the Pagliacci Pizza Restaurant. The application submitted by Kinderace seeking a reasonable use exception, and thereby seeking to exercise the fundamental right of some economically viable use, necessarily relied on the certainty that Parcel 9032 was a legal lot,

and with the normal rights associated with a legal lot. As a legal lot, Washington recognizes a fundamental right to make "*some* economically viable use of the property." *Guimont*, 121 Wn.2d at 602 (italics by the Court). By taking away that right, the trial court undermines the certainty that should be associated with an approved legal lot.

### 4. The Decision Below Is Directly Contrary to *Presbytery of Seattle v. King County*

In *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990), the Court stated the law clearly:

> [I]f the landowner succeeds in showing that a regulation denies all economically viable use of **any parcel** of regulated property, then a constitutional taking has occurred.

*Id.* at 335 (emphasis added). That is precisely what Kinderace has shown. The regulated parcel is 9032, as it currently exists. That entire parcel has been taken by denial of all economically viable use of that regulated parcel. Moreover, Parcel 9032 as it currently exists was not part of any joint development with Parcel 9058. The Court should find a taking of Parcel 9032.

## REQUEST FOR ATTORNEYS FEES

Pursuant to RAP 18.1, and RCW 8.25.075, Kinderace hereby requests attorneys fees and expenses. *See Sintra v. City of Seattle*, 131 Wn.2d 640, 668, 935 P.2d 555 (1997).

## CONCLUSION

The current configuration of Parcel 9032 is a legally formed and recognized lot. It is undisputed that there is not, nor has there ever been, any development or economic use allowed within the metes and bounds of current Parcel 9032. Moreover, while a portion of the old Parcel 9032 was used to facilitate development of Parcel 9058, there is no portion of the current Parcel 9032 that was ever used in conjunction with Parcel 9058.

The City's beef is really with itself. Once it approved the BLA, the rights of ownership and reasonable use attached. The City may now wish it had acted differently. The policy of finality has kicked in, and the denial of all economically viable use of the discrete and separate legal lot is a regulatory taking that demands the constitutional remedy of compensation.

Kinderace relied on the approved BLA, and expended substantial sums of money and effort in seeking reasonable use. The Hearing Examiner decision rejected the reasonable use exception, thereby effecting a permanent denial of any economically viable use of Parcel 9032. That is a taking.

The Court should reverse the denial of Kinderace's summary judgment motion and declare that the City is liable for a taking of Parcel 9032. With a taking established, the Land Use Petition would be moot. Also, with the taking established, the Court should remand for determination

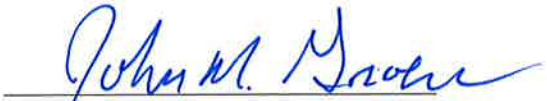
of the remaining issue which is the measure of just compensation. Of course, the City would be free to negotiate with Kinderace for a different result, but whether or not the City has any further leeway to allow the Pagliacci Pizza Restaurant is unclear.

Kinderace respectfully requests that the Court find the City liable for a taking of Parcel 9032, and that Kinderace is entitled to compensation to be determined in further court proceedings.

DATED: October 8, 2015.

Respectfully submitted,

JOHN M. GROEN



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## DECLARATION OF SERVICE

I, Brien P. Bartels, declare that I am a citizen of the State of Washington, that I am over the age of 18, and not a party to this action; and that on October 8, 2015, I caused a true copy of the foregoing APPELLANT'S OPENING BRIEF to be served on the following persons via First-Class Mail:

Kim A. Pratt
Charlotte A. Archer
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Issaquah, WA 98027

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 8th day of October, 2015, at Bellevue, Washington.

BRIEN P. BARTELS
Legal Secretary