No. _____

In the
Supreme Court of the United States

KINDERACE, LLC,

Petitioner,

v.

CITY OF SAMMAMISH,

Respondent.

On Petition for Writ of Certiorari to the Washington State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "parcel as a whole" inquiry, as set out in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978), allows a court to combine an owner's interests in two legally distinct, but previously commonly owned, adjacent parcels when determining the extent of property that a court should consider when reviewing a regulatory takings claim. This critical and unresolved question of constitutional law is currently pending before this Court in *Murr v. State of Wisconsin*, Dkt. No. 15-214.

LIST OF ALL PARTIES

Kinderace, LLC, was the plaintiff and appellant in the state proceedings below, and is the petitioner herein.

The City of Sammamish, a Washington state municipal corporation, is the respondent.

CORPORATE DISCLOSURE STATEMENT

Kinderace, LLC has no parent corporation and no publicly held company owns more than 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

State Statutes

Constitution

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

Kinderace respectfully petitions for a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division I.

OPINIONS BELOW

Division I of the Washington State Court of Appeals issued its published opinion at *Kinderace, LLC v. City of Sammamish*, 194 Wash. App. 835 (2016). *See* Petitioner's Appendix (Pet. App.) at A. The court of appeals' order denying reconsideration appears at Pet. App. at B. The Washington State Supreme Court's order denying review appears at Pet. App. at D.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. Kinderace filed a lawsuit challenging the City's decision to deny its land-use application and alternatively seeking compensation for a regulatory taking under the Fifth and Fourteenth Amendments to the United States Constitution.[1] The permit decision was upheld and the takings claim was denied in the July 5, 2016, decision of Division I of the Washington State Court of Appeals. The opinion became final on January 4, 2017, when review was denied by the Washington State Supreme Court. This petition is timely filed pursuant to Rule 13.

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[1] Kinderace's complaint alleged a regulatory taking under the state constitution; however, the underlying permit decision required the City to consider federal takings law when issuing its decision and the parties argued both state and federal takings law on summary judgment, and the courts below determined the takings analysis under both state and federal law. *See* Pet. App. A-5, C-3. Where the state court of last resort actually determines a federal issue, questions about how or when the claim was presented are irrelevant to this Court's jurisdiction under 28 U.S.C. § 1257; *see also Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (applying "the elementary rule that it is irrelevant to inquiry . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided" (internal quotation marks and citations omitted)). It is enough that the state court reached and decided the federal question, as though properly raised. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959). Under these circumstances, the Court has recognized jurisdiction, including in takings cases. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (taking claim raised under the Florida Constitution but general ruling of no unconstitutional taking was sufficient basis for Supreme Court consideration of the federal issue). *See generally* Stephen M. Shapiro, Supreme Court Practice § 3.19 (10th ed., 2013).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. Pet. App. at F.

STATEMENT OF THE CASE

A. Severson Invested in Undeveloped Commercial Property That the City Later Deemed Both a "Building Site" and a No-Build Area

For over a decade, Elliot Severson, a partner in SR Development LLC and the principal owner of Kinderace, LLC (collectively, Severson), has been involved in the phased development of three commercial properties in the City of Sammamish, a suburb of Seattle, Washington. Pet. App. A at 2. The lots are located just south of a major shopping area, alongside 228th Avenue NE, the City's major

north/south thoroughfare. *Id.* Although King County rezoned the lots for commercial use in 1995, the planned development progressed slowly due delays caused by the City's incorporation in 1999 and its subsequent adoption of a development moratorium while it enacted new zoning, building, and critical areas regulations. This case concerns the last parcel in the phased development—Parcel 9032.[2]

Once the City lifted the moratorium in 2001, Severson and his partners immediately began developing the lots. Between 2001 and 2004, the City approved a Starbucks, medical office building, and bank on Parcel 9039, and a Kentucky Fried Chicken/Taco Bell restaurant and a Kindercare daycare facility on Parcel 9058—the lots adjacent to the parcel at issue in this case. Pet. App. A at 2-3. But the City conditioned the permit to build the restaurant/daycare center on Parcel 9058 on Severson installing a storm water detention pond. *Id.* at 2. Due to wetland buffers on Parcel 9058, the only feasible place to locate the pond was on the northen portion of the adjacent Parcel 9032, which is bisected by George Davis Creek.[3] Severson agreed to the condition and installed the facility with the intention that the area of Parcel 9032 south of the creek would be reserved 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

[2] A map of the properties appears at Pet. App. A-3.

[3] CP 1784, 1914.

> 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 [Avenue]. 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 namely the area south of George Davis Creek.[4]

Severson completed construction of the restaurant/daycare facilities in 2005, then sold the developed lot (Parcel 9058) in 2006. Pet. App. A at 4. In accordance with the planned development of Parcel 9032, Severson applied for two boundary line adjustments to place the storm water detention pond onto Parcel 9058—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."[5] Severson did not grant the new owner of Parcel 9058 an easement for the pond and collected no rent for the facility during the pendency of the boundary line adjustment

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[4] Declaration of Elliott Severson (CP 2153).

[5] *Id.* (CP 2155).

process.[6] The "intention was to transfer the pond to 9058 for no consideration."[7]

The City reviewed and approved the boundary line adjustments in 2008. Pet. App. A at 5. Critically, the City's code prohibited approval of an adjustment if the proposed configuration would "[r]esult in a lot that does not qualify as a building site." Sammamish Municipal Code (SMC) 19A.24.020(4). The code defines a "building site" as an area of land "capable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions." SMC 19A.04.060. Thus, by approving the adjustment, the City confirmed that reconfigured Parcel 9032 constituted a building site. The approved adjustments were recorded in January 2009 along with a warranty deed transferring the northern portion of old Parcel 9032 to the new owner of Parcel 9058. Pet. App. A at 5.

Severson's development expectations were perfectly reasonable when he first acquired Parcel 9032 in 2004. The portion of the lot south of the creek was zoned for commercial use and was more than large enough to accommodate the 25-foot buffers required by the critical areas ordinance while still providing sufficient space for development.[8] Moreover, between 1995 and 2005, both King County and Sammamish allowed similar development in close proximity to the

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[6] *Id.*

[7] *Id.*

[8] CP 1784, 1914.

stream and wetlands in the area. Indeed, the City itself had undertaken development activities on another adjacent property (Parcel 9053) near the stream, having approved minimal buffers to facilitate the lot's use.[9]

In December 2005, however, the City changed course in regard to the allowable uses of Parcel 9032. Although the property remained zoned for commercial use, the City's update of its critical areas ordinance designated George Davis Creek as a "stream of significance," thereby expanding the buffer from 25 feet to 150 feet. As a result, the entire southern portion of Parcel 9032—the portion that Severson purchased for future development—became completely encumbered by critical area buffers. Pet. App. A at 3-4. Even if the City reduced the buffers by the maximum amount allowed under the code (a 50 percent reduction), Parcel 9032 would still only have a total of 83 square feet of developable land.[10]

In its current configuration, Parcel 9032 is an undeveloped, 0.75 acre commercial "building site" fronting a major highway, and is taxed for its value as commercial property. All of the surrounding parcels are developed. But, under the City's most recent critical areas update, there is no economically viable use of Parcel 9032 without a Reasonable Use Exception (RUE) pursuant to SMC 21A.50.070(2)(a)(I), which requires the City to consider federal takings law when determining whether to approve or deny the application.

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[9] CP 1905 and 1907 (graphics showing surrounding development), 1782.

[10] CP 1789; CP 3:15-18.

B. The City Denied a Reasonable Use Exception Due to Development on an Adjacent Parcel

Between 2006 and 2013, Severson—acting first through SR Development then later through Kinderace—submitted multiple proposals to develop Parcel 9032. Pet. App. A at 6. The City rejected each and every one, citing the critical areas update. *Id.* Because 83 square feet (not even the size of a small bedroom) of developable land is far too small for any viable economic use, Severson applied for an RUE (Pet. App. A at 7), which authorizes the City to reduce the size of critical area buffers in order to allow a reasonable use of the property. *See* SMC 21A.50.070(2); Pet. App. F at 3-4. Severson initially sought approval for an Ace Hardware retail store—a project with substantial community support that cost more than $100,000 in pre-development expenditures.[11] The City resisted the proposal, so Severson scaled back and proposed a much smaller Pagliacci Pizza restaurant.[12]

The RUE application included a detailed economic analysis concluding that the pizza restaurant represented the minimum financially feasible project.[13] Being sensitive to environmental concerns, Severson designed the site plan to minimize environmental impacts by avoiding any disturbance to the on-site stream and wetland, and to maintain a minimum 25-foot buffer from the stream.[14] The total site

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[11] CP 4:16-18.

[12] CP 1780.

[13] CP 1810 (citing AR 684-693).

disturbance would be only 36 percent.[15] The City's environmental expert determined that any project impacts to the environment could be mitigated, concluding that "[t]here are a variety of approaches that could be taken that could constitute compensatory mitigation for the proposed impacts."[16]

Regardless, the City denied the application upon its conclusion that the detention pond north of the creek on the pre-2008 configuration of Parcel 9032 provided a "reasonable use" of the commercial zoned property, precluding any further use. The City refused to consider the current, post-boundary line configuration of Parcel 9032—the legal configuration of the lot at the time Severson filed his application.

C. Lower Courts Denied Severson's Regulatory Takings Claim, Concluding That Kinderace Received Sufficient Value from the Adjacent Parcel

After the City denied the RUE, Severson filed a lawsuit seeking compensation for a regulatory taking because the government is per se liable for a taking when it applies a regulation in a manner that denies the landowner all economically beneficial use of the property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Guimont v. Clarke*, 121 Wash. 2d 586, 600 (1993) (recognizing and incorporating the *Lucas* test). Because no one disputed that the City's RUE decision had denied all

[14] CP 1916.

[15] CP 1916-17.

[16] CP 895.

economically viable use of Parcel 9032 in its current configuration, the key issue argued by the parties on summary judgment was how to determine the relevant parcel in the context of a phased development. The trial court ultimately adopted the City's contention that, due to common ownership, the development rights in Parcels 9058 and 9032 must be aggregated when considering Severson's takings claim. Pet. App. C at 2-3. Based on that determination, the trial court dismissed Severson's *Lucas* claim. *Id.*

Division I of the Washington State Court of Appeals affirmed the trial court's decision that the current, lawful configuration of Parcel 9032—which was unquestionably denied all use—was not the relevant parcel for takings inquiry.[17] Pet. App. A at 8-10. Instead, the court of appeals aggregated the development rights in the two adjacent parcels to hold that the City's denial of the RUE application did not deprive Severson of all economically viable use of the Parcel 9032. *Id.*

The court below held, without citation, that the relevant parcel must be determined by the configuration of the land at the time the government adopts the challenged regulation, rather than the time the regulation is applied. *Id.* at 10. Moreover, the court ignored the City's own role in creating the new configuration of Parcel 9032 by its approval of a boundary line adjustment which appended the stormwater detention facility (and the land it was located on) to the adjacent parcel. Pet. App. A at 9. Nor did the court consider the rights existing in the undeveloped commercial property, or the fact that the

[17] The court decided the issue under the Takings Clauses of both the Washington and U.S. Constitutions. Pet. App. A at 8.

property is taxed as commercial property, or the City's requirement that Severson construct the detention pond (the so-called prior "reasonable use") as a mandatory condition for approval of the development of adjacent Parcel 9058. *Id.*

Severson moved for reconsideration, which the court denied. Pet. App. B. Severson's petition for review to Washington State's Supreme Court was also denied. Pet. App. D. This petition follows.

REASONS FOR GRANTING THE WRIT

This case turns on the important and unresolved "relevant parcel" question, which is currently under consideration by this Court in *Murr v. State of Wisconsin*, Dkt. No. 15-214. Like the Wisconsin Supreme Court in *Murr*, the Washington court below held that contiguous parcels that share some degree of common ownership are combined as the relevant parcel for a regulatory taking claim. Pet. App. A at 8-10. The lower court cited no authority for its decision to aggregate an owner's interest in an adjacent parcel when determining the relevant parcel—indeed, there is no such authority in this Court's case law. Morever, the decision below directly conflicts with *Lost Tree Village Corporation v. United States*, in which the Federal Circuit held that common ownership alone is an insufficient basis on which to conclude that two parcels in a phased development project constitute a single parcel for the purpose of the takings analysis. 707 F.3d 1286, 1294 (Fed. Cir. 2013) (certiorari petition pending No. 15-1192). Thus, the Washington Court of Appeals adopted a rule of federal constitutional law that conflicts with opinions of this Court, as well as other Courts of Appeals' decisions, warranting review. Accordingly, this Court should grant review and hold

the case pending the decision in *Murr* and the resolution of the *Lost Tree Village* petition.

I

THE WASHINGTON COURT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL TAKINGS LAW THAT THIS COURT SHOULD SETTLE

A. The Lower Court's Aggregation of Adjacent Lots When Determining the Relevant Parcel Presents a Critical and Unresolved Issue of Takings Law

As demonstrated by this Court's decision to grant the petition for a writ of certiorari in *Murr v. Wisconsin*, *cert. granted*, No. 15-214 (Jan. 15, 2016), the question how to determine the relevant parcel in a regulatory takings case warranted review. Determination of the relevant parcel is a "critical question[]" in the takings analysis.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 496 (1987) (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)). Indeed, in many cases, "the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the

economic impact wrought by the regulation." *Lost Tree Village*, 707 F.3d at 1292; *see also District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (the "definition of the relevant parcel profoundly influences the outcome of the takings analysis"), *cert. denied*, 531 U.S. 812 (2000).

This case is particularly worthy of review because the lower court's decision to aggregate all of the development rights that an owner may have in adjoining parcels with the impaired rights on the subject property embraces a version of the relevant parcel rule that has never been endorsed by this Court. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978). As explained by *Penn Central*, the relevant parcel rule holds that takings law does not divide a single parcel into discrete segments in order to determine whether rights in any particular segment have been abrogated. *Id.* That case, and its progeny, focus only on the host of rights inherent in a single parcel, referred to as the "parcel as a whole," when determining the relevant parcel. *Id.* Significantly, *Penn Central* refused to follow a New York rule that had allowed courts to aggregate an owner's other property investments, and later criticized the aggregative approach as "extreme" and "unsupportable" in *Lucas*, 505 U.S. at 1016 n.7.

Furthermore, the decision below exacerbates a long-standing nationwide split of authority on whether courts should aggregate an owner's other real estate interests when determining the relevant parcel. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (noting "the difficult, persisting question of what is the proper denominator in the takings fraction"). Some

courts allow the government to aggregate all contiguous property under common ownership in order to reach the largest possible denominator (thereby diluting the economic impact and diminishing the possibility that even the most extreme regulation of property will effect a compensable taking). *See*, *e.g.*, *Bevan v. Brandon Township*, 438 Mich. 385, 395 (1991) (despite division into separate, identifiable lots, the court ruled that "contiguous lots under the same ownership are to be considered as a whole"); *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720, 729 (2006), *cert. denied*, 549 U.S. 1280 (2007) ("We conclude that the extent of contiguous commonly owned property gives rise to a rebuttable presumption defining the relevant parcel.").

Other courts limit the relevant parcel inquiry to the lot impacted by the regulatory decision. *See*, *e.g.*, *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) ("Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified."); *American Savings & Loan Association v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (contiguously owned parcels not presumptively aggregated); *City of Coeur d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006) (reversing trial court decision that aggregated two contiguous parcels); *State ex rel. R.T.G., Inc. v. Ohio*, 98 Ohio St. 1, 12 (2002) (approximately 100 acres outside of the regulated area was not included in the relevant parcel even though it was contiguous and commonly owned).

Historically, Washington courts had adhered to the single parcel approach. *See Presbytery of Seattle v. King Cty.*, 114 Wash. 2d 320, 334 (1990); *see also Peste v. Mason Cty.*, 133 Wash. App. 456, 473 (2006). But, with the published decision below, the Washington court has now taken opposite position on the relevant parcel issue.

The decision below provides a stark illustration of how important the relevant parcel determination is to a regulatory takings claim. The City did not dispute that it denied all proposals to develop Parcel 9032 in its current configuration. Thus, if the relevant parcel in this case is the post-boundary line adjustment configuration of the lot, then the City's application of its critical areas ordinance unquestionably deprived the owner of all economically viable use. Indeed, the case recalls *Lucas*, where the government's decision to expand the size of its coastal buffers eliminated the owner's development rights. *See Lost Tree Village*, 707 F.3d at 1291-92 ("Regulations requiring land to be left substantially in its natural state—such as when a wetlands fill permit is denied—may sometimes 'leave the owner of land without economically beneficial or productive options for its use.' ") (quoting *Lucas*, 505 U.S. at 1018).

If, however, the relevant parcel includes land transferred to the adjacent parcel years before the City applied its critical areas ordinance to prohibit all use, then the City's denial may not have deprived the owner of all value in the land. Inconsistency in the relevant parcel determination results in inconsistent results in takings claims and uncertainty for both landowners and government. *See Lucas*, 505 U.S. at 1016 n.7. Review of this issue is both warranted and necessary.

B. The Lower Court's Refusal To Consider the Inherent Value of Parcel 9032 at the Time the Regulation Was Applied Undermines the Purpose of the Regulatory Takings Doctrine

The lower court's aggregative approach to determining the relevant parcel allowed the court to rule that there had been no taking without ever determining the value of Parcel 9032 (which is taxed for its value as undeveloped commercial property)—let alone evaluating the impact of the City's newly adopted critical area regulations. That approach frustrates the purpose of regulatory takings law, which is intended to determine "the actual burden imposed on property rights, [] how that burden is allocated, [or] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43 (2005).

The aggregative approach is also contrary to the basic understanding that property, by its very nature, is assumed to have value. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949) ("Since land and buildings are assumed to have some transferable value, when a claimant for just compensation for their taking proves that he was their owner, that proof is ipso facto proof that he is entitled to some compensation."). Indeed, the right to build on one's property is a fundamental and valuable attribute of property ownership. *Norco Const., Inc. v. King Cty.*, 97 Wash. 2d 680, 684 (1982) ("The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit."); *Washington ex rel. Seattle Title Trust Co. v. Roberge*,

278 U.S. 116, 121 (1928) (One of the defining characteristics of property ownership is the right to make reasonable use of one's land.). Even land designated for the preservation of environmentally sensitive areas has inherent value. *See* Wash. Rev. Code 64.04.130 (conservation buffers constitute valuable real property); *see also Klickitat County v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5-6 (Bd. Tax App., June 12, 2002) (buffer area constitutes property; the holder of the conservation interest must pay property taxes). Takings law, therefore, demands that the courts identify "the present value of the regulated property and the value of the property before imposition of the regulation to determine whether the regulation has diminished the economic uses of the land to such an extent that an unconstitutional taking has occurred." *Peste*, 133 Wash. App. at 473.

Here, however, the Washington court concluded that the pre-boundary line adjustment configuration of Parcel 9032 was the relevant parcel simply because that was the configuration when the City updated its critical areas ordinance. Pet. App. A at 10. As a result of that circular reasoning, the court determined that the City's expansion of its critical areas buffers did not extinguish Severson's rights in that lot. *Id.* But, as a matter of black-letter law, the date an ordinance is adopted has no bearing on the rights inherent in one's property—particularly in the context of a regulatory taking claim. *See Palazzolo*, 533 U.S. at 627; *see also Lucas*, 505 U.S. at 1015 (holding that the South Carolina Coastal Council had taken an owner's right to build homes on lots zoned for residential development when the council adopted a law imposing a mandatory coastal buffer so large that it totally enveloped both

lots). Indeed, the very suggestion that a city can, by adopting an ordinance, alter an individual's rights in his or her property is contrary to one of the most basic tenets of the Takings Clause: "[A] State, by ipse dixit, may not transform private property into public property without compensation." *Palazzolo*, 533 U.S. at 628 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

Simply put, a property owner must be allowed to challenge the imposition of a land-use regulation based on the value of his or her property at the time the regulation is applied to the land. *Palazzolo*, 533 U.S. at 628. Here, the City applied its critical areas ordinance to deny all use of Severson's property when it denied the RUE in 2013. That is the date for determining the "present value of the regulated property"—*i.e.*, the relevant parcel. *See Peste*, 133 Wash. App. at 473.

C. Public Policy Demands That The Relevant Parcel Inquiry Consider Timing and Investment Expectations

The configuration of any given parcel of property may change over time—particularly in areas like the Puget Sound region, where developable lands are limited and the population continues to grow. Furthermore, both residential and commercial development commonly occur in phases. Typically, lots are developed and sold in order to fund further development in a process that can last years. *See* Daisy L. Kone, *Land Development*, 144-60 (10th ed., 2006). As lots are sold, the developer does not typically retain an ownership interest in all of the land, and his economic expectations with regard to the first phase of the development are met. *Id.* at 217. A developer may

choose to retain an interest in individual parcels for future development long after a phase has been completed. *Id.* Thus, although a developer may hold an interest in several adjacent properties over the course of the entire project, those interests will be temporally severed as phases are completed. They will also be severed by different investment expectations.

Other courts faced with this type of ownership/development consider the timing of events when determining the relevant parcel. In this regard, the Federal Circuit explained that "[t]he timing of the property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor to be considered." *Palm Beach Isles Assocs.*, 208 F.3d at 1381. Importantly, it is the owner's expectations at the time of acquisition—not the government's—that shapes the relevant parcel. *Forest Prop., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (Court should focus "on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property.").

Without consideration of these essential factors, the aggregative approach adopted in the decision below will deprive developers of the protections guaranteed by the Takings Clause by always exaggerating the denominator in the takings calculus. Such a rule harms the public's interest in new development, which is absolutely essential in the fight against the skyrocketing cost of housing in our major urban areas.

II

THE CASE SHOULD BE GRANTED AND HELD PENDING THE DECISION IN *MURR v. WISCONSIN*

In *Murr*, the Court has agreed to decide the relevant parcel question in a different context involving common ownership. As framed by the petition for a writ of certiorari in that case, the question presented is whether "two legally distinct, but commonly owned contiguous parcels, must be combined," when the two parcels were acquired at separate times. Pet. at I, *Murr*, No. 15-214. Like the present case, the relevant parcel issue in *Murr* arises in the context of an application for an exemption from a regulatory restriction that would otherwise wipe out all economically viable use of one of the two parcels.

The fact that this case involves a small commercial development rather than residential property does not militate against review. To the contrary, this Court has apparently held the petition for a writ of certiorari in *Lost Tree Village* (No. 15-1192) pending the resolution of *Murr*. *Lost Tree Village* raises the relevant parcel question in the context of a large development project that spanned several decades. 707 F.3d at 1288. In that case, a commercial property company developed thousands of acres of land beginning in the 1960s. *Id*. When the company eventually applied to develop Plat 57—approximately a quarter of which is encumbered by wetlands—the Army Corps denied the permits, concluding that the developer had already received sufficient reasonable use via the development of neighboring plats. *Id*. at 1291. The developer sued for a total regulatory taking of Plat 57. *Id*.

Like this case, the relevant parcel determination in *Lost Tree Village* turned on the question whether the court can aggregate development that took place on commonly owned, contiguous parcels. *Id*. at 1292-94. While the Washington court in this case answered that question in the positive (Pet. App. A at 8-10), the Federal Circuit concluded that it could not do so:

> The mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis.

Lost Tree Village, 707 F.3d at 1294.

The decision below raises federal constitutional questions common to *Murr* and *Lost Tree Village*. If left unreviewed, the Washington court's holding threatens to produce unsound, unjust, and inconsistent results. The Washington court's erroneous decision warrants review to ensure full consideration and exposition of the proper criteria for determining the relevant parcel in regulatory takings cases. It would be an efficient use of judicial resources for the Court to consider the issue in the context of a small developer like Severson, in addition to a small landowner like the petitioners in *Murr* and the large commercial development in *Lost Tree Village*.

Given the common legal issue presented, the Court should grant the petition and hold the case pending its decision in *Murr* and resolution of the *Lost Tree Village* certiorari petition, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

Defining the relevant parcel based solely on contiguous common ownership may be an easy way to resolve the relevant parcel question, but it does little to serve the policies underlying the Takings Clause and is blind to the realities of development. A relevant parcel analysis must take full account of the timing, the owner's investment expectations, and economic realities when land development is involved. Review is necessary and warranted to promote uniformity in our case law and to ensure against the erosion of the Takings Clause.

For the reasons set forth above, Kinderace's petition for writ of certiorari should be granted and held pending the Court's decision in *Murr* (and the resolution of the *Lost Tree Village* certiorari petition), and then dispose of the petition as appropriate in light of that decision.

DATED: April, 2017.

Respectfully submitted,

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TABLE OF CONTENTS

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KINDERACE LLC, a Washington limited liability company, Appellant,	)	No. 73409-1-I
	)	DIVISION ONE
v	)	PUBLISHED
CITY OF SAMMAMISH, a Washington municipal corporation, Respondent.	)	OPINION
	)	FILED: July 5, 2016

Spearman, J. — By means of a boundary line adjustment, Kinderace LLC (Kinderace) created a new 32,850 square foot parcel of which all but 83 square feet had been designated by the City of Sammamish (City) as environmentally critical areas and buffers. The City denied Kinderace's request for a reasonable use exception that would have allowed it to proceed with a proposed development project on the new parcel. Kinderace brought a regulatory takings claim against the City, alleging that the denial deprived it of all economically viable use of the parcel. The trial court dismissed Kinderace's claim, finding that it had received reasonable beneficial use of the property as part of a joint development with an adjoining parcel. Kinderace appeals.[1] Finding no error, we affirm.

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[1] Kinderace also assigned error to the trial court's dismissal of its Land Use Petition Act (LUPA) claim, but because it makes no argument in support of that claim, we conclude its appeal of that issue has been abandoned. Allen v. Asbestos Corp., Ltd.,138 Wn.

(continued...)

FACTS

This dispute concerns a parcel of land located in Sammamish, Washington, near the east side of 228th Avenue NE. In 1995, four owners of adjacent parcels -- Parcel 9032, Parcel 9058, Parcel 9053, and Parcel 9039, sought a rezone of their properties for commercial development. The rezone was granted and the owners worked with developers Elliot Severson and Ed and Mark Roberts (who later became Lynn LLC and SR Development, LLC), to prepare and submit plans for joint development.

In 2001, Lynn LLC submitted permit applications for Phase 1 of a "Plateau Professional Center," which would consist of a Starbucks and a medical office building on Parcel 9039. Clerk's Papers (CP) at 75. The permit was issued on November 12, 2002. In August and September of 2003, SR Development applied for a permit for the joint development of Parcel 9058 and 9032 as part of Phase 2. A Kentucky Fried Chicken/Taco Bell restaurant and a Kindercare daycare facility were to be built on Parcel 9058. Parcel 9032 was intended for use as a storm water detention pond.

SR Development also applied for a variance from the strict application of the 150-foot wetland buffer requirement, insisting that the site could not be developed without it. After much discussion, the City approved the development permit and variance for the three parcels on July 9, 2004. The detention pond to be

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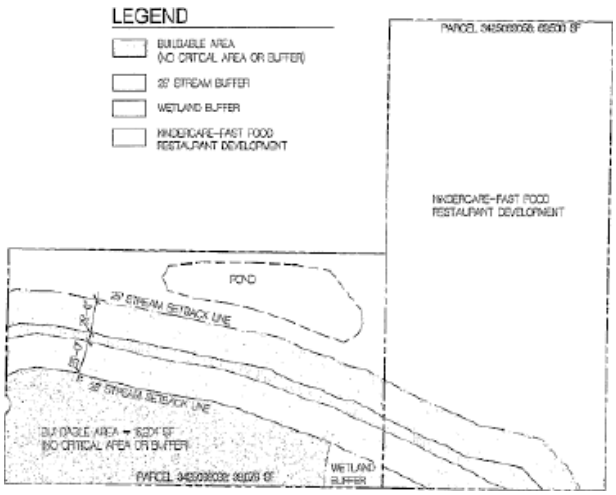
[1] (...continued)
App. 564, 582, n.5, 157 P.3d 406 (2007) (citing Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (where no argument is presented in appellant's opening or reply brief, we consider the assignment of error abandoned.)

located north of the creek on Parcel 9032 was critical to allowing Parcel 9058 to be developed as extensively as proposed in Phase 2.

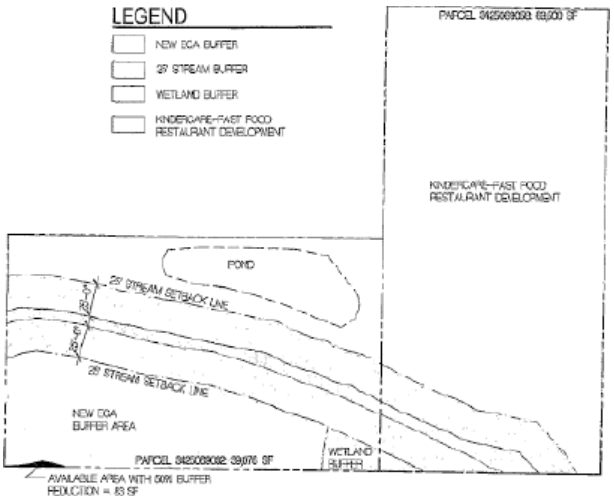
The Plateau Professional Center was completed in July 2005. The diagram below represents the division and character of the area consisting of Parcels 9032 and 9058 at that time.



CP at 1142. [Enhanced detail versions of the maps in this portion of the Appendix are reproduced in Appendix Part E.]

On December 20, 2005, the Sammamish City Council adopted an ordinance regarding environmentally critical areas that increased the buffer

requirements for bogs and streams. At that time, Parcel 9032 was bifurcated by George Davis Creek, which had been newly designated as a stream of significance subject to a 150-foot buffer requirement. The ordinance also resulted in the south portion of Parcel 9032 being designated as a buffer area and not subject to development without buffer modification or a reasonable use exception (RUE). SMC 21A.50.070(2)(a)(i). The diagram below shows the newly designated buffer area south of George Davis Creek on Parcel 9032.



CP at 1143.

In 2006, Parcel 9058 was sold for $3,815,000. The record shows that development and the substantial

sale price were made possible by the ability to locate the storm water detention pond on Parcel 9032.[2]

Severson met with City officials in August 2006 to discuss developing the remainder of Parcel 9032 as a parking lot. CP 622-624. During that meeting, the City expressed that the parcel did not satisfy the criteria for a RUE because it was already being used as a storm water detention facility.

The Plateau Professional Center would be considered a reasonable use for all of the parcels involved in the joint development, including Parcels 9032 and 9058. Id.

In 2007 and 2008, SR Development applied for two boundary line adjustments that modified the boundaries of Parcel 9032, placing the detention pond onto Parcel 9058. By design, new Parcel 9032 was completely constrained by stream, wetlands, and buffers. The boundary line adjustments were approved and the notices contained an "Approval Note" which stated that "This Request Qualifies for Exemption under SMC 19.20.010. It Does Not Guarantee the Lots Will be Suitable for Development Now or in the Future." CP at 530-532; 542-544.

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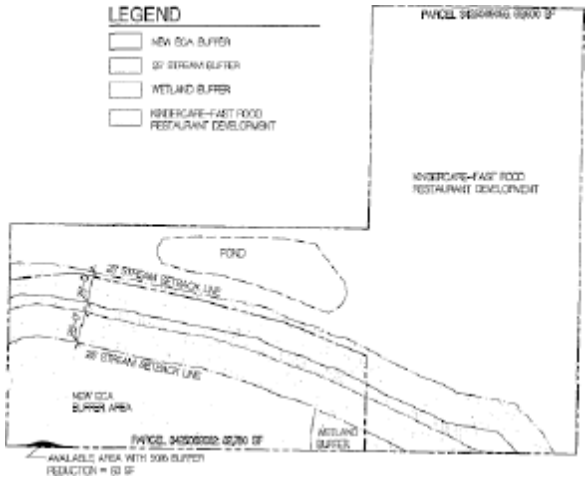
[2] Mr. Severson testified as follows before the hearing examiner:

> And ultimately we made a deal to really save our investment in 9058, because we'd had so much money sunk into 9058 that the only way we could make that work was if we could get two uses on 9058. And the only way we could do that is if the detention pond was not located on 9058 but was elsewhere. And the elsewhere was north of the creek on 9032.

CP at 1448.

On January 21, 2009, the line adjustments were recorded, along with a warranty deed transferring a portion of old Parcel 9032 to the owner of Parcel 9058. CP 534-537. The results of the two boundary line adjustments can be seen in the diagram below. New Parcel 9032 no longer contains the storm water detention pond but only extends as far as the stream setback line to the north.



CP at 1144.

SR Development appealed the assessed value of new Parcel 9032 and the value was reduced from $198,600 to $50,000. SR Development conveyed new Parcel 9032 to Kinderace LLC, on September 12, 2012.

Kinderace consists of one member, Camtiney, LLC, whose members include Severson and his family.

Kinderace applied for a RUE in 2013 and initially sought approval for an ACE Hardware store, but chose to scale back and propose a Pagliacci Pizza restaurant. Kinderace contended that it had been denied all reasonable use of new Parcel 9032 as it was presently situated.

The City denied the RUE application, finding that new Parcel 9032 "ha[d] already been extensively developed with multiple commercial reasonable uses" by SR Development "a corporate alter ego" of Kinderace. CP at 71. As a result, the application of the ordinances did not deny all reasonable use of the property. Id. Kinderace appealed the City's decision to the hearing examiner. The appeal was denied, with the hearing examiner finding that

> [a] more than reasonable use had been obtained when Parcels 9058 and 9032 were jointly developed. The question now is whether the new parcel Severson created (by shrinking the size of Parcel 9032, after a reasonable use had been obtained and after more restrictive sensitive area regulations had been adopted, such that it no longer contains the portion of the lot which was actively used in the 2003-2004 development) is itself eligible for a reasonable use exception. It is not.

CP at 1793-1794.

Kinderace brought a LUPA action in superior court challenging the hearing examiner's decision and also filed a separate complaint, alleging that new Parcel

9032 had been subjected to a regulatory taking. The two actions were consolidated.

The trial court dismissed Kinderace's LUPA action, finding that it had failed to meet its statutory burden to establish satisfaction of the criteria for relief. The parties disputed whether the dismissal of the LUPA claim dispensed with Kinderace's regulatory takings claim. The City filed for a motion summary judgment and Kinderace filed a motion for partial summary judgment. The trial court granted the City's motion and denied Kinderace's cross-motion, finding that Kinderace had achieved reasonable beneficial use of Parcel 9032, in both the old and new configurations, as part of the joint development with Parcel 9058. Kinderace appeals.

DISCUSSION

We review an order granting summary judgment de novo. Briggs v. Nova Servs., 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id; CR 56(c).

The United States Constitution, U.S. Const, amend. 5, provides in relevant part, "nor shall private property be taken for public use, without just compensation." Similarly, Washington Const, art. 1, § 16, provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made . . . ." In Washington, a land use regulation which too drastically curtails an owner's use of his or her own property can cause a constitutional "taking." Presbytery of Seattle v. King Cty, 114 Wn.2d

320, 329, 787 P.2d 907 (1990). In a regulatory takings claim, one threshold issue is whether a city's decision denies a landowner a fundamental attribute of property ownership, such as the right to possess, exclude others, dispose of, or make some economically viable use of the property. Kahuna Land Co. v. Spokane Cty., 94 Wn. App. 836, 841, 974 P.2d 1249 (1999). The landowner has the burden of showing that the mere enactment of a regulation constitutes a taking. Guimont v. Clarke, 121 Wn.2d 586, 601-02, 854 P.2d 1 (1993).

Kinderace contends the trial court erred when it granted the City's summary judgment motion and denied its motion for partial summary judgment. It argues that the undisputed evidence shows that the City's environmental regulations deprived it of all economically viable use of new Parcel 9032. Kinderace claims the trial court erred when it concluded that Kinderace had achieved reasonable beneficial use of the new parcel as part of its joint economic development of the old parcel. According to Kinderace, the error arises from the trial court's failure to treat new Parcel 9032 as a new legal lot that "carries all the fundamental attributes of property ownership." Br. of Appellant at 12.

Kinderace argues that under RCW 58.17.040(6), the City's approval of the boundary line adjustment, which created new Parcel 9032, established its right to develop the lot irrespective of any prior development associated with old Parcel 9032. Kinderace's argument turns on its interpretation of RCW58.17.040(6). That statute provides:

> A division made for the purpose of alteration by adjusting boundary lines, between platted or

> unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site;

Under its reading of the statute, Kinderace argues the City's approval of the boundary line adjustment accomplished two things. First, it created new Parcel 9032 as "a new legal lot that carries with it the right to some economically viable use." Br. of Appellant at 13. And second, it "necessarily determined that the proposed new Parcel 9032 would qualify as a building site." Appellant Reply Br. at 10-11. As a result, according to Kinderace, it now has a right to develop new Parcel 9032, separate and distinct from any benefit derived from the prior joint development associated with old Parcel 9032 and the City is bound by its determination that the new parcel is a "building site." Appellant Reply Br. at 12.

In support of the first proposition, Kinderace relies primarily on City of Seattle v. Crispin, 149 Wn.2d 896, 71 P.3d 208 (2003). But the case is inapposite because it does not discuss the issue of development rights associated with a new parcel created by a boundary line adjustment. The issue there was simply "whether the division of land that created [a new] tax lot . . . qualified as a boundary line adjustment for purposes of the exemption from the subdivision statutes as set forth in RCW 58.17.040(6)." Crispin, 149 Wn.2d at 902. The court held that as long as a boundary line adjustment did not create an additional lot, it was within the statutory exemption, Id. at 904. The opinion does not address the proposition Kinderace asserts

here. Accordingly, we reject the argument because it is not supported by relevant authority.

Furthermore, the undisputed facts do not support Kinderace's claim that the City's environmental regulations deprived it of all economically viable use. As the trial court noted, Kinderace does not appear to dispute that at the time the City adopted the relevant environmental regulations, old Parcel 9032 had already been fully developed as part of the Plateau Professional Center. Indeed, the record shows that but for the use of that parcel for the storm drainage pond, the profitable development of the center would not have been possible. Nonetheless, Kinderace seems to argue that, having redrawn the boundaries of old Parcel 9032 to exclude the drainage pond and to encompass a specific area that is almost completely encumbered by significant environmental regulations, it is entitled to either a RUE or to be compensated again. We disagree.

In determining whether Kinderace had derived an economic use of new Parcel 9032, the trial court properly considered the configuration of the parcel at the time the regulations were enacted. To hold otherwise would enable a property owner to subvert the environmental regulations by changing parcel boundaries to consolidate critical areas. Once an owner had delineated a parcel that was entirely constrained, he or she could claim deprivation of all economically viable use. Here, SR Development instituted the boundary line adjustment, specifically carving out the parts of old Parcel 9032 to contain only the environmentally critical areas, and conveyed the property to Severson's new entity, Kinderace. The area of new Parcel 9032 had already been developed as part

of the joint development of Plateau Professional Center. We reject the argument that Kinderace can use a boundary line adjustment to isolate the portion of its already-developed property that is entirely constrained by critical areas and buffers, and then claim that the regulations have deprived that portion of all economically viable use.

Next, Kinderace argues that the City's approval of the boundary line adjustment established that new Parcel 9032 was a "building site" and therefore approved it for potential development. Under RCW 58.17.040(6), a boundary line adjustment cannot "create any additional lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site." Because the statute does not define the term "building site," the applicable definition is established by local ordinance, here, SMC 19A.04.060.[3] Under that ordinance, "building site" is defined as an area of land either (1) "[c]apable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions;" or (2) "[c]urrently legally developed."

Kinderace relies on Mason v. King County, 134 Wn. App. 806, 808-809, 142 P.3d 637 (2006), which held that "RCW 58.17.040(6) does not permit a local jurisdiction to approve a boundary line adjustment

---

[3] "[L]ocal governments are free to define the dimensions of a 'building site' so long as that definition is consistent with applicable local zoning requirements." Mason v. King Cty., 134 Wn. App. at 811.

application that would transform a legally created lot into a substandard, undersized lot." But Kinderace does not argue that new Parcel 9032 is either substandard or undersized. Instead, relying solely on the first definition of "building site" listed in SMC 19A.04.060, Kinderace argues that in approving the boundary line adjustment, the City "necessarily" determined that new Parcel 9032 was a lot capable of being developed. Appellant Reply Br. at 10.

The argument is not well taken. First, as the City points out, even if it had determined that the proposed new Parcel 9032 was not developable without an exception for reasonable use, it still could not have denied Kinderace's boundary line adjustment application when it met all of the requirements. Cox v. City of Lynnwood, 72 Wn. App. 1, 7-8, 863 P.2d 578 (1993) (city may not look beyond whether the individual application complies with its ordinance to justify denial of the boundary line adjustment). The application satisfied RCW 58.17.040(6) because it did not create any additional lots. And it qualified as a building site under SMC 19A.04.060(2) because at the time of the boundary line adjustment, it was an area of land "[c]urrently legally developed" as part of the Plateau Professional Center. SMC 19A.04.060(2). Under these circumstances, the argument that the approval was a determination that the site is developable is untenable. This is especially so in light of the express statement in the notice of approval that "[i]t Does Not Guarantee the Lots Will be Suitable for

Development Now or in the Future."[4] CP 530-32; 542-44.

We conclude that the trial court did not err when it granted the City's motion for summary judgment and denied Kinderace's motion for partial summary judgment.

The City asks for fees under RCW 4.84.370. The statute provides that:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party

[4] Similarly, Kinderace's argument that it expended significant resources on developing proposed uses for new Parcel 9032 in reliance on the finality of the City's approval of the boundary line adjustment is unavailing. Appellant's Reply Br. at 13-14. At issue in this case is whether approval of the boundary line adjustment was also a determination that the lot was developable. The finality of the boundary line adjustment is not in dispute.

> on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Here, the statute does not apply because there is no appeal of a decision to issue, condition, or deny any development permit or similar land use approval or decision. Kinderace appealed only the trial court's dismissal of its regulatory takings claim; it did not appeal the dismissal of its LUPA claims. We therefore decline to award fees under RCW 4.84.370.[5]

Affirmed.

S/ Spearman, J.

WE CONCUR:

S/ Leach, J.

S/ Cox, J.

[5] Because we affirm the trial court's dismissal of Kinderace's claim, we also deny its request for fees under RCW 8.25.075.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KINDERACE LLC, a Washington limited liability company, Appellant,	)	No. 73409-1-I
	)	DIVISION ONE
v.	)	
CITY OF SAMMAMISH, a Washington municipal corporation, Respondent.	)	

ORDER DENYING APPELLANT'S AND RESPONDENT'S MOTIONS FOR RECONSIDERATION

Appellant, Kinderace, LLC and Respondent, City of Sammamish filed motions for reconsideration of the opinion filed in the above matter on July 5, 2016. The court called for answers and the parties filed their answers to the motion.

The court has determined that both parties' motions for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's and respondent's motion for reconsideration of the opinion filed on July 5, 2016, are denied.

DATED this 22nd day of August, 2016.

FOR THE COURT:

s/ Spearman, J.
Judge

Appendix C–1

Honorable Laura Inveen

FILED
King County, Washington
MAR 25 2015
Superior Court Clerk

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

KINDERACE, LLC, a Washington limited liability company,

Plaintiff,

vs.

CITY OF SAMMAMISH, a Washington municipal corporation,

Defendant.

No. l3-2-23271-5 SEA

(Consolidated with No. 14-2-05538-2 SEA)

ORDER GRANTING CITY OF SAMMAMISH'S MOTION FOR SUMMARY JUDGMENT AS TO KINDERACE, LLC'S REMAINING CLAIMS

THIS MATTER came before the court on the City of Sammamish's Motion for Summary Judgment as to Kinderace's Remaining Claims, and the court has reviewed and considered the following:

1. City of Sammamish's Motion for Summary Judgment as to Kinderace's Remaining Claims;

2. Declaration of Evan Maxim in Support of City of Sammamish's Motion for Summary Judgment, with attached Exhibits;

3. Kinderace's Opposition to City's Motion for Summary Judgment;

4. Declaration of William T. Geyer, AICP, in Opposition to City Motion for Summary Judgment, with attached Exhibits;*

5. Declaration of Elliott J. Severson in Opposition to City Motion for Summary Judgment, with attached Exhibits;*

6. Declaration of Charles A. Klinge in Opposition to City Motion for Summary Judgment, with attached Exhibits;

7. Plaintiff's Cross-Motion for Partial Summary Judgment;

8. City of Sammamish's Reply in Support of its Motion for Summary Judgment as to Kinderace's Remaining Claims; and

9. City of Sammamish's Objection to Portions of Declarations of Elliot J. Severson and William T. Geyer in Opposition to City's Motion for Summary Judgment.

* *City's 3/2/15 objection to certain portions of these declarations is well-taken, and the court sustains those objections.*

The court finds that, consistent with affirming the Hearing Examiner's denial of a Reasonable Use Exception, Plaintiff Kinderace achieved reasonable beneficial use of Parcel 9032 as part of the joint development with Parcel 9058 for the Plateau

Professional Center project and therefore, the Defendant City of Sammamish is not liable for a regulatory taking.

The court further finds that Plaintiff Kinderace has failed to establish the essential elements of an inverse condemnation claim in support of its physical taking (inverse condemnation) claim and that the City's 228th Ave NE road improvements were constructed consistent with the deed and slope easement and did not encroach on Plaintiff Kinderace's property.

The court further finds that *caselaw cited by Plaintiff is all factually distinguishable, and does not address the legal issues at hand. E.G. in City of Seattle v. Crispin, 149 Wn.2d 896 (2003), the issue was whether a reconfiguration of a boundary line which resulted in a building site that did not previously exist violated the state subdivision code, RCW 58.17 and comparable ordinance. The issue was not whether any boundary line adjustment automatically created a buildable lot. Lucas v. South Carolina Coastal Council, 505 U.S. 1008 (1992) did not address joint development of parcels.*

The court being fully advised, it is hereby ORDERED, ADJUDGED AND DECREED that the City of Sammamish's Motion for Summary Judgment is GRANTED. All of Kinderace's remaining claims are dismissed with prejudice.

DONE this *24* day of March, 2015.

S/ *Laura Inveen*
Judge Laura Inveen

Prepared and presented by:

Kenyon Disend, PLLC

By s/ *Danielle Evans*
Kari L. Sand
WSBA No. 27355
Danielle M. Evans
WSBA No. 39925
Attorneys for Defendant
City of Sammamish

Appendix D–1

THE SUPREME COURT OF WASHINGTON

KINDERACE LLC,	)	
	)	
Petitioner,	)	No. 93622-6
	)	
v.	)	**ORDER**
	)	
CITY OF SAMMAMISH,	)	Court of Appeals
	)	No. 73409-1-I
Respondent.	)	

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered at its January 3, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

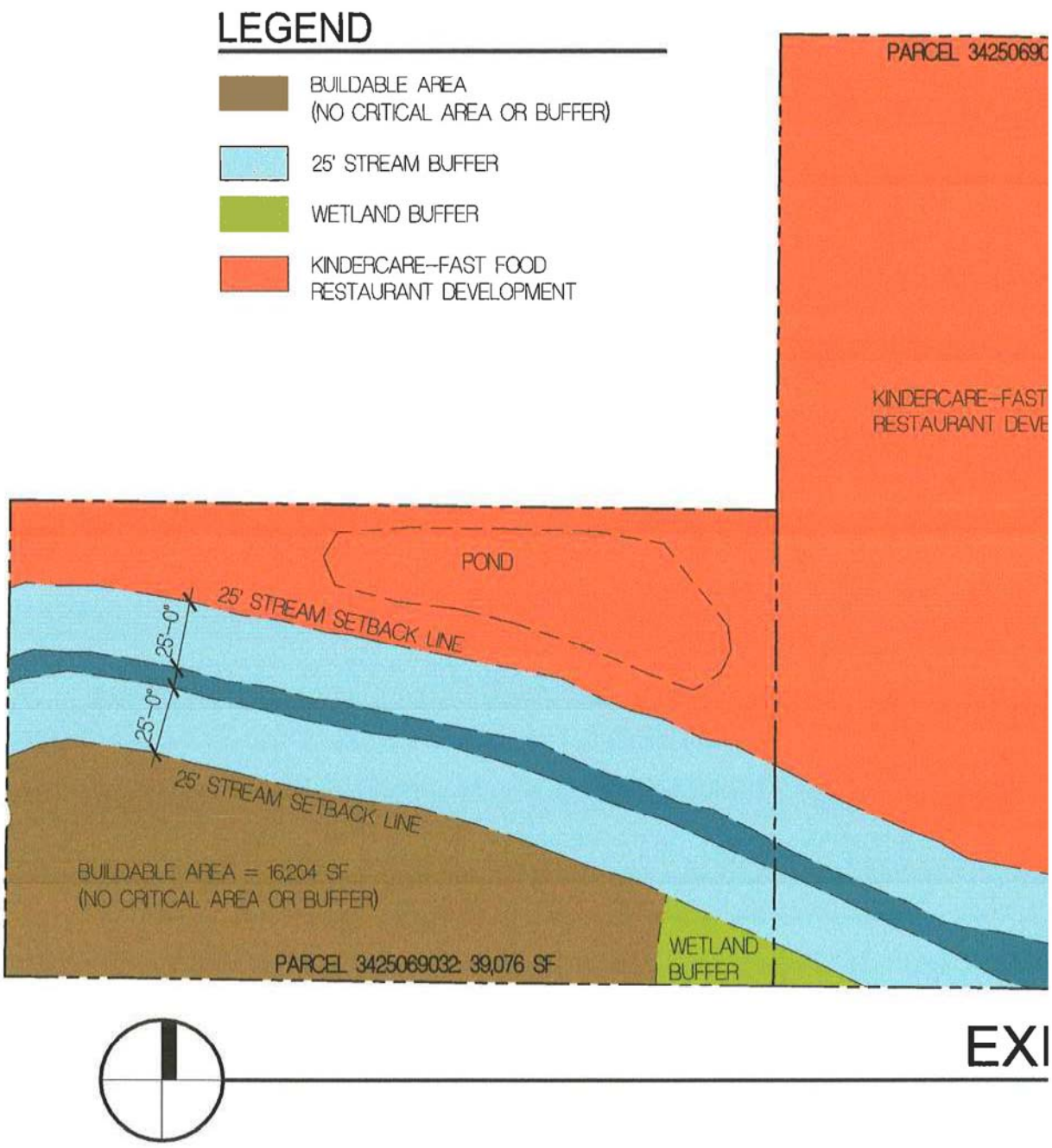
IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 4th day of January, 2017.

For the Court

S/ Madsen, C.J.
CHIEF JUSTICE

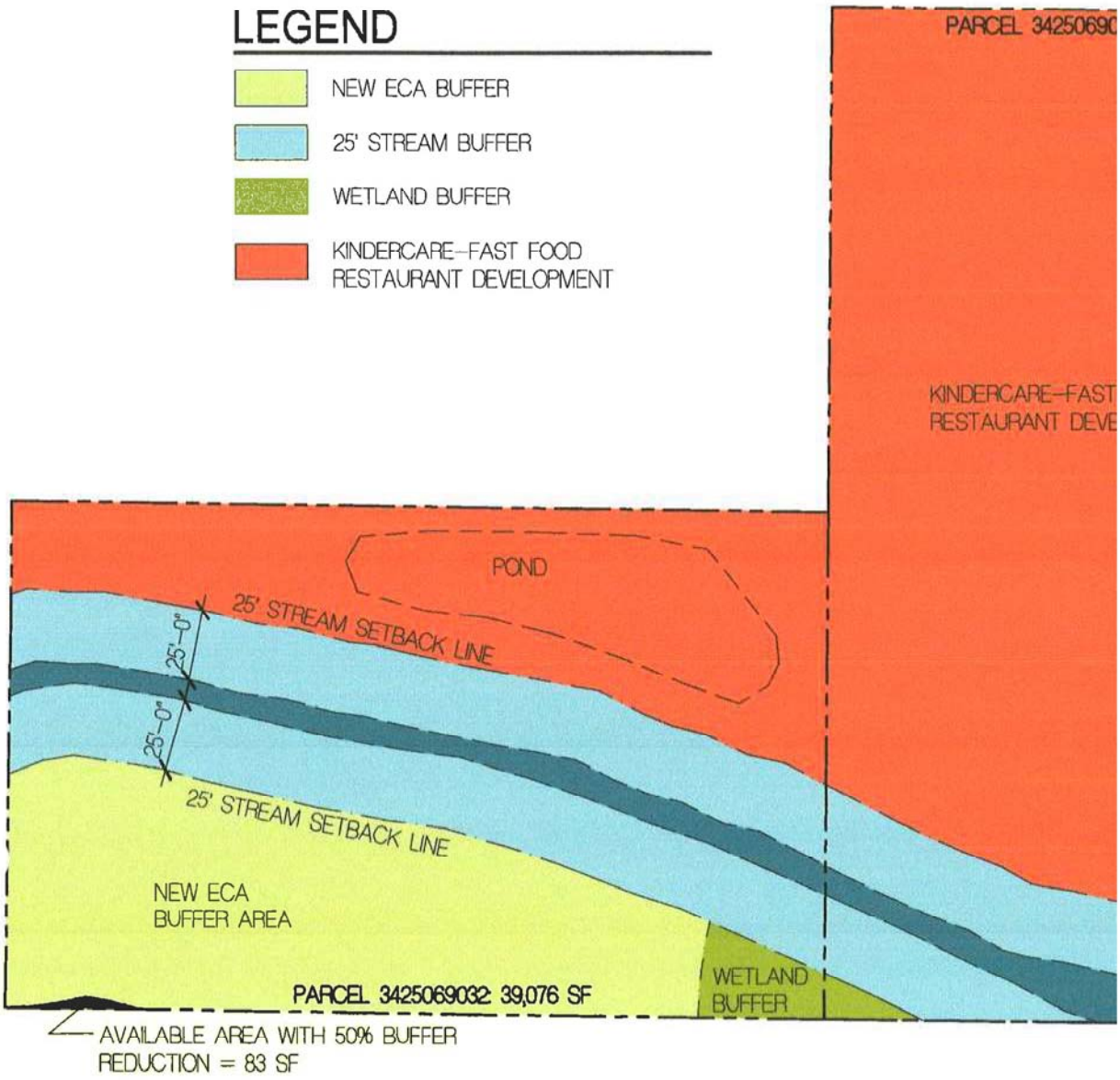


PARCEL 9032 BUILDABLE AREA
JULY 7, 2005

(KINDERCARE CONSTRUCTION AND SITE WORK COMPLETE)

FLOISAND STUDIO
1941 1ST AVE. S., #2E
SEATTLE, WA 98134

KINDERA



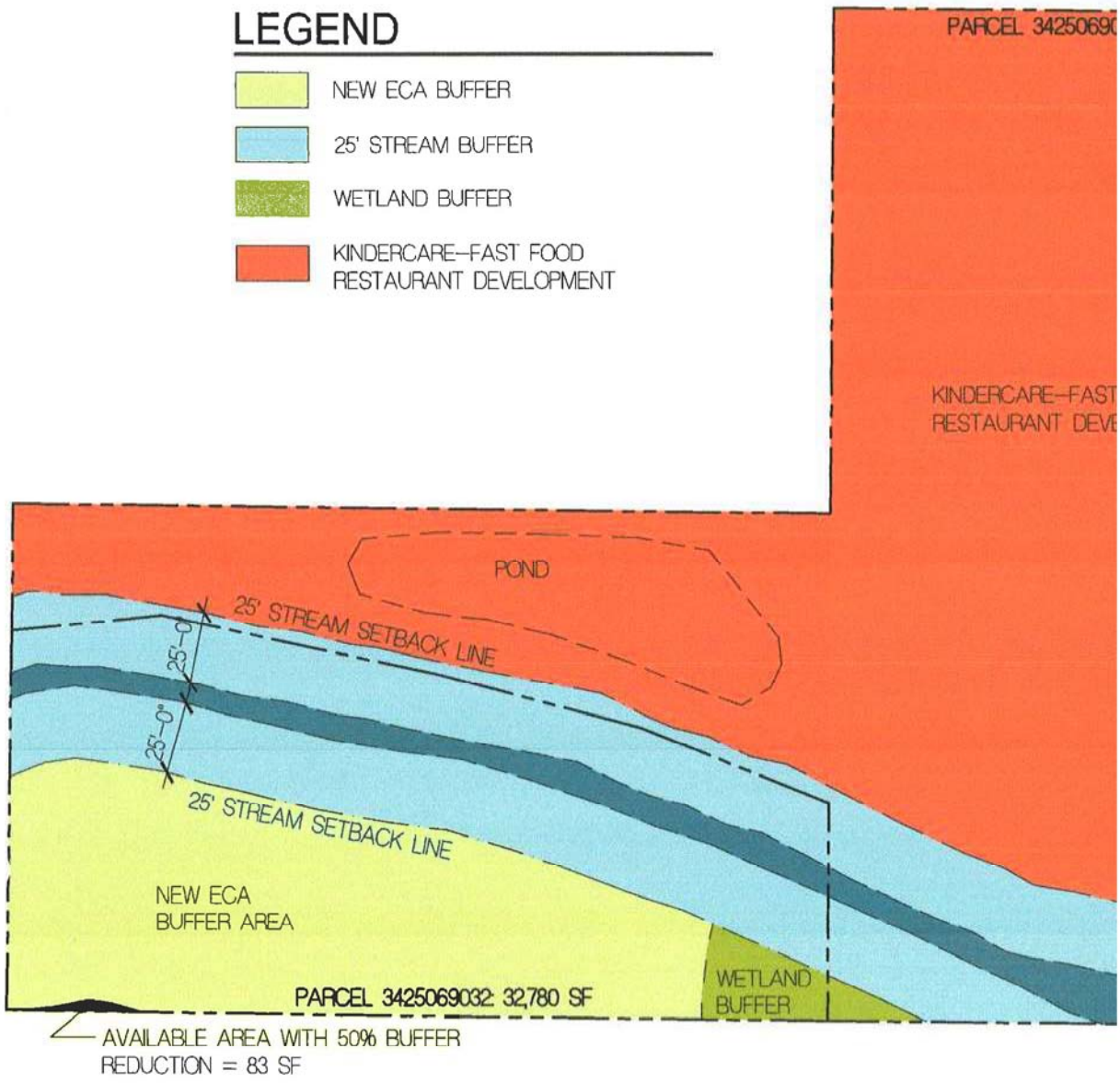
EX

PARCEL 9032 BUILDABLE AREA
JANUARY 3, 2006

(ORDINANCE No. O2005-193 EFFECTED-NEW CRITICAL AREA BUFF

FLOISAND STUDIO
1941 1ST AVE. S., #2E
SEATTLE, WA 98134

KINDER



EX

PARCEL 9032 BUILDABLE AREA

JANUARY 21, 2009

(BLA #2 RECORDED)

FLOISAND STUDIO
1941 1ST AVE. S., #2E
SEATTLE, WA 98134

KINDER

Appendix F–1

Sammamish Municipal Code

Chapter 19A.04

DEFINITIONS

19A.04.060 Building site.

"Building site" means an area of land, consisting of one or more lots or portions of lots, that is:

(1) Capable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions; or

(2) Currently legally developed. (Ord. O2010-284 § 2 (Att. A))

Chapter 19A.24

BOUNDARY LINE ADJUSTMENTS

19A.24.010 Purpose.

The purpose of this chapter is to provide procedures and criteria for the review and approval of adjustments to boundary lines of legal lots or tracts in order to rectify defects in legal descriptions, to allow the enlargement or merging of lots to improve or qualify as a building site, to achieve increased setbacks from property lines or sensitive areas, to correct situations wherein an established use is located across a lot line, or for other similar purposes. (Ord. O2010-284 § 2 (Att. A))

19A.24.020 Procedures and limitations of the boundary line adjustment process.

Adjustment of boundary lines between adjacent lots shall be consistent with the following review procedures and limitations:

(1) Applications for boundary line adjustments shall be reviewed as a Type 1 permit as provided in Chapter 20.05 SMC. The review shall include examination for consistency with SMC Title 21A, the shoreline master program including SMC Title 25 and for developed lots building and fire codes and may include review by the applicable agency for department of health regulations and water and sewer district requirements;

(2) Any adjustment of boundary lines must be approved by the department prior to the transfer of property ownership between adjacent legal lots;

(3) May require modification or sharing of access from public works to be approved by the City engineer;

(4) A boundary line adjustment proposal shall not:

(a) Result in the creation of an additional lot;

(b) Result in a lot that does not qualify as a building site pursuant to this title;

(c) Reduce conforming lot dimensions such as area or width to nonconforming dimensions;

(d) Reduce the overall area in a plat or short plat devoted to open space;

(e) Result in a lot that previously met sewer/water district standards for sewer/water service no longer meeting district standards;

(f) Be inconsistent with any restrictions or conditions of approval for a recorded plat or short plat;

(g) Involve lots which do not have a common boundary; or

(h) Circumvent the subdivision or short subdivision procedures set forth in this title. Factors which indicate that the boundary line adjustment process is being used in a manner inconsistent with statutory intent include: numerous and frequent adjustments to the existing lot boundary, a proposal to move a lot or building site to a different location, and a large number of lots being proposed for a boundary line adjustment;

(5) The elimination of lines between two or more lots for the purpose of creating a single lot that meets requirements as a building site shall be considered an adjustment of boundary lines and shall not be subject to the subdivision and short subdivision provisions of this title; and

(6) Recognized lots in an approved site plan for a conditional use permit, special use permit or commercial site development permit shall be considered a single site and no lot lines on the site may be altered by a boundary line adjustment to transfer density or separate lots to another property not included in the original site plan of the subject development without additional conditional use permit, special use permit or commercial site development review and approval. (Ord. O2010-284 § 2 (Att. A))

21A.50.070 Exceptions.

* * * * *

(2) Reasonable Use Exception. If the application of this chapter would deny all reasonable use of the property, the applicant may apply for an exception pursuant to this subsection:

(a) The director may approve alterations to critical areas, critical area buffers and setbacks to allow a reasonable use not otherwise allowed by this chapter when the following criteria are met:

(i) The application of this chapter would deny all reasonable use of the property;

(ii) There is no other reasonable use with less impact on the critical area;

(iii) The proposed development does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site and is consistent with the general purposes of this chapter and the public interest; and

(iv) Any alterations permitted to the critical area or buffer shall be the minimum necessary to allow for reasonable use of the property; and any authorized alteration of a critical area under this subsection shall be subject to conditions established by the department including, but not limited to, mitigation under an approved mitigation plan. (Ord. O2013-350 § 1 (Att. A); Ord. O2005-193 § 1; Ord. O2005-172 § 4; Ord. O99-29 § 1)

Appendix F–5

Revised Code of Washington

64.04.130

Interests in land for purposes of conservation, protection, preservation, etc.—Ownership by certain entities—Conveyances—Definitions.

A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, federally recognized Indian tribe, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. Any such right or interest constitutes and is classified as real property. All instruments for the conveyance thereof must be substantially in the form required by law for the conveyance of any land or other real property.

The definitions in this section apply throughout this section unless the context clearly requires otherwise.

(1) "Nonprofit historic preservation corporation" means an organization which qualifies as being tax exempt under 26 U.S.C. section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and which has as one of its principal purposes the conducting or facilitating of historic preservation activities within the state, including conservation or preservation of historic sites, districts, buildings, and artifacts.

(2) "Nonprofit nature conservancy corporation" means an organization which qualifies as being tax exempt under 26 U.S.C. section 501(c)(3) (of the United States Internal Revenue Code of 1954, as amended) as it existed on June 25, 1976, and which has as one of its principal purposes the conducting or facilitating of scientific research; the conserving of natural resources, including but not limited to biological resources, for the general public; or the conserving of natural areas including but not limited to wildlife or plant habitat.