No. 16-1194

In The
Supreme Court of the United States

KINDERACE, LLC,

Petitioner,

v.

CITY OF SAMMAMISH, WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a boundary line adjustment – a statutory tool in Washington to make minor changes to existing property lines between two or more contiguous parcels – erases the development history of the underlying real property and creates a new parcel with a new bundle of property rights, including the right to make a second economic use of the real property, even though it was fully developed in an economically viable manner *prior to* the City's enactment of heightened environmental regulations.

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STATEMENT OF THE CASE

Division One of the Washington State Court of Appeals unanimously affirmed a trial court's order finding that no regulatory takings occurred as a matter of law when the City of Sammamish ("City") adopted heightened environmental protection regulations *after* Petitioner Kinderace, LLC ("Severson")[1] had profitably developed his property, and those regulations left a small portion of Severson's developed parcel encumbered by critical areas. *See* Pet. App. A-1.

The Washington State Court of Appeals understandably rejected Severson's attempt to manufacture a takings claim by using a boundary line adjustment (a Washington statutory tool to adjust boundary lines between existing parcels) to delineate a parcel fully constrained by critical areas years *after* the City adopted the stricter environmental regulations and *after* Severson had lucratively developed the property. *Id*. at A-11.

The City offers the following counterstatement of the case in order to clarify and correct the facts and the procedural posture of this case as recited in the Petition for Writ of Certiorari ("Petition"). Sup. Ct. R. 15.

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[1] Kinderace, LLC is the corporate alter ego of Elliot Severson. Washington State Court of Appeals, Division One, Clerk's Papers ("CP") at 2022; CP 299-301. Kinderace, LLC is fully owned by its managing member Camtiney, LLC, of which Elliot Severson is the managing member. CP 299; CP 301. Camtiney's other members are Severson's wife and three children. CP 301. For purposes of this Brief in Opposition, these entities and individuals are collectively referred to as "Severson."

A. Severson Lucratively Developed Parcel 9032 and Its Neighboring Properties from 2001-2005 as a Joint Project.

In the late 1990s, Severson and his business partners, Ed and Mark Roberts, acquired the development rights to two adjacent commercial parcels within the City of Sammamish, bearing Tax Assessor identification numbers 342506-9039 ("Parcel 9039") and 342506-9058 ("Parcel 9058"). CP 1418-19.

Severson sought to heavily develop these parcels, and proposed joint development via a phased project known as the "Plateau Professional Center." CP 406-15; CP 1799. In 2002, construction commenced on the Plateau Professional Center project ("Project"), Phase 1: a Starbucks and medical office building on Parcel 9039. CP 337; CP 618; CP 1420-21. Phase 1 provided reciprocal vehicle access and circulation to the Phase 2 development of Parcel 9058. *Id*.

Severson then began construction on Phase 2 of the Project: a KFC and Taco Bell restaurant, and a Kindercare daycare facility on Parcel 9058.[2] *Id*.; CP

[2] Severson claims that Parcel 9032 was part of a three-phase development proposal. Pet. 3-4. This is inaccurate. In fact, Severson proposed a two-phase commercial development on Parcels 9058 and 9039, and – years into the Project – purchased Parcel 9032 for the express purpose of housing a stormwater detention pond to handle runoff from the commercial structures. CP 406-15; CP 1420-21. The development proposal unequivocally stated that Severson had no further construction proposed for the remainder of Parcel 9032 (aside from the stormwater detention pond). CP 382-84; CP 444-52; CP 809-23; CP 1168-82.

384-98; CP 444-52; CP 256-68. To accommodate Severson's aggressive plans to build out Parcel 9058, a stormwater detention pond to handle runoff from the project had to be placed off-site.[3] CP 406-15; CP 1448; CP 1799; CP 386-98. With two commercial businesses proposed for Parcel 9058, there was simply no room left to accommodate the necessary stormwater detention pond for these structures. *Id*.

In June 2004, Severson purchased adjacent Parcel 342506-9032 ("Parcel 9032"), the property at issue in this case, for the express purpose of housing the stormwater detention pond. CP 435-37; CP 1448. Severson specifically included the *whole* of Parcel 9032 in the Project proposal to the City. CP 382-84; CP 444-52; CP 809-23; CP 1168-82. Severson testified that the intensity of development in Phase 2 of the Project was possible only because Parcel 9032 was used for the stormwater detention pond:

> We made a deal [to purchase Parcel 9032] to really save our investment in 9058, because we had so much money sunk into 9058 that the only way we could make that work was **if**

[3] Severson states the City "conditioned" his development on Parcel 9058 on his use of Parcel 9032 as a stormwater pond. Pet. 4. This is inaccurate. To the contrary, Severson wanted to place two commercial uses (a restaurant and daycare) on Parcel 9058, which left no room for the required facilities to handle stormwater runoff from both structures. CP 406-15; CP 1448; CP 1799; CP 386-98; CP 256; CP 265. Rather than reduce the footprint of his proposal, Severson purchased Parcel 9032 for the express purpose of housing the stormwater detention pond to accommodate the structures on Parcel 9058. *Id*. Doing so, according to Severson, "save[d] [his] investment into 9058." CP 1448.

> **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 1448 (emphasis added). Severson's Project on Parcels 9039, 9058, and 9032 was completed in July 2005. CP 1182; CP 1434.

Severson sold Parcel 9058[4] (containing the KFC and Taco Bell restaurant, and the daycare facility) in 2006 for $3,815,000.[5] CP 524-25. Again, Severson testified that the intensity of development and Parcel 9058's related sale price were only possible because Parcel 9032 was used as the stormwater detention pond serving Parcel 9058. CP 1448; CP 1505-06.

B. Severson Admitted Parcel 9032's Sole Value Was Extracted as a Stormwater Detention Pond.

In a letter to the City in 2004, Severson's representative admitted that Severson had utilized all of

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[4] Severson's timeline includes a material inaccuracy. Pet. 5. While Severson sold Parcel 9058 in 2006, he did not shift the boundary line between Parcel 9032 and Parcel 9058 – so that the stormwater detention pond was part of the commercial development on Parcel 9058 – until 2008. CP 524-25; CP 539.

[5] Severson purchased Parcel 9058 for $888,140. CP 351. Parcel 9032 was purchased for $175,000. CP 435. Petitioner incorrectly states he obtained no compensation for the use of Parcel 9032 for stormwater detention. Pet. 5-6. Severson testified that his ability to build out Parcel 9058 with two businesses – and the lucrative sale price therefor – was due to the placement of the detention pond on Parcel 9032. CP 1448.

the buildable area on Parcel 9032 to construct the stormwater detention pond. CP 256; CP 265. The letter admits that even if Severson replaced the stormwater pond on Parcel 9032 with an above ground stormwater vault, which would have a smaller footprint than the current detention pond:

> [T]he shape and location of the parcel on which the pond is located would not yield any more useable land area for the project from this reduced footprint. Relocating the storm facility to a different portion of the site is of no benefit either. **Because of the environmental constraints on the parcel where the pond is located, it effectively has no value as a building site and only has value as a storm drainage pond location.**

CP 265 (emphasis added). Notably, this letter preceded the City's adoption of more stringent environmental regulations by more than a year. Similarly, as part of the Project development proposal, Severson completed a Washington State Environmental Policy Act checklist which asked whether he intended to further develop the parcels utilized in said Project (including Parcel 9032). CP 797. Severson's answer: "No." *Id*.

C. *After* Severson Completed the Project, the City Adopted Regulations for Environmentally Critical Areas that Affected Severson's Ability to *Further* Develop Parcel 9032.

On December 20, 2005, the Sammamish City Council adopted Ordinance No. 02005-193, which amended

Sammamish Municipal Code ("SMC") ch. 21A.50 regarding environmentally critical areas within the City ("ECA Regulations"). CP 462-522. The ECA Regulations increased the buffers for both bogs and streams throughout the City. CP 499; CP 489.

As a result of the ECA Regulations, George Davis Creek ("Creek") – which bisects Parcel 9032 – was identified as a stream of special significance, with expanded protected buffers. CP 489; CP 497-99; CP 73-4; CP 331; CP 618. At the time the City passed the ECA Regulations, the portion of Parcel 9032 north of the Creek housed the storm water detention pond, while the southern portion of Parcel 9032 was subsumed by newly expanded stream, wetland, and bog buffers. CP 499; CP 489; CP 73-4; CP 331.

In August 2006, Severson's representative met with the City to discuss proposed construction of a parking lot south of the Creek on Parcel 9032.[6] CP 622-24; CP

[6] Severson states that, even before the ECA Regulations took effect, the southern portion of Parcel 9032 was sufficiently large to provide space for development. Pet. 6-7. This is misleading. Parcel 9032 pre-ECA Regulations is immaterial to this analysis as Severson selected a use for the Parcel and developed it accordingly before the ECA Regulations were adopted. Absent a reduction of the buffers on the lower portion of the Parcel 9032 – which would not have been permitted under the SMC, because of the previous construction of the stormwater pond on Parcel 9032 – no such development could have occurred on the southern portion. CP 622-24. Moreover, even before the ECA Regulations took effect, any development on the southern portion was substantially limited due to the Creek and its buffers, and the wetlands and their buffers on neighboring parcels. CP 231; CP 1610. The other example referenced by Severson does not involve *two* proposed uses of

1517; CP 1544. Pursuant to the ECA Regulations, construction within wetland, stream, and associated buffers is authorized only by means of buffer averaging, buffer modification, or approval of a reasonable use exception ("RUE"). CP 622-24; SMC § 21A.50.070(2)(a). During the meeting, City staff cautioned Severson "that the proposed parking lot does not satisfy the criteria for approval of a [RUE], in part because the property [Parcel 9032] is already in use [as a stormwater detention facility]." CP 622-24.

D. Four Years After the ECA Regulations Were Adopted, Severson Adjusted his Boundary Lines to Shrink the Existing Parcel 9032 to the Area Encumbered by the Creek, Wetland, and Associated Buffers.

In 2008, years after the City advised Severson that he would not be entitled to a second economic use of Parcel 9032, Severson's representative requested a boundary line adjustment ("BLA"). CP 539; CP 542-44. The BLA adjusted the boundaries of Parcel 9032 to carve off the detention pond on the northern portion of the parcel, which then became part of Parcel 9058. *Id*. Severson knowingly adjusted the boundaries of Parcel 9032 so that the entire parcel was now constrained by the Creek, wetland area, and associated buffers. *Id*.

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a single parcel with environmental constraints, but rather a City-owned parcel used as a stormwater detention pond. CP 365; CP 1353; CP 1782.

A BLA is an administrative process in Washington whereby a property owner may request the adjustment of property lines between legally created lots; notably, it is initiated by an owner, not a city. Revised Code of Washington ("Wash. Rev. Code") § 58.17.040(6); Pet. App. F-1 – F-3, SMC ch. 19A.24 (Boundary Line Adjustments). This statutory process cannot be used to create a lot or reduce the size of a lot so that it contains insufficient area and dimension to meet minimum zoning requirements, except as may be provided by a municipality's code. *See* Wash. Rev. Code § 58.17.040(6). A city may not rely on discretionary factors in deciding whether to approve a requested BLA. *See Cox v. City of Lynnwood*, 72 Wash. App. 1, 7-8, 863 P.2d 578 (1993). When an application satisfies the statutory requirements, the BLA must be granted. *Id*. A city can face monetary penalties and civil damages if it denies the requested BLA, particularly on the basis of any criterion not provided by law. *Id*.

For example, State law prohibits the use of a BLA that results in a "substandard, undersized lot," as defined by a city or county. Wash. Rev. Code § 58.17.040(6); *see Mason v. King Cnty*., 134 Wash. App. 806, 811, 142 P.3d 637 (2006). Severson's proposed BLA did not result in substandard, undersized lots. CP 531; *see Mason*, 134 Wash. App. at 811 (holding that "local governments are free to define the dimensions of a 'building site' "). Under SMC § 21A.25.040, the City does not exclude critical areas when determining whether the proposed boundaries meet the City's dimensional requirements for lots. As a result, a lot can

be encumbered by a wetland and its buffer and still meet minimum lot-size and setback requirements. *See* SMC § 21A.25.040.

Because Severson's application met all of the requirements for a BLA under the SMC, the City approved the requested BLA. CP 530; CP 1614-16. Importantly, SMC § 19A.24.020(4)(b) states that a BLA must result in a lot that qualifies as a "building site" – a term defined at SMC § 19A.04.060 as "an area of land, consisting of one or more lots or portions of lots" that is "capable of development" *or* "currently legally developed."[7] *See* Pet. App. F-1 – F-2. Here, because of Parcel 9032's previous development history, the BLA contained an "Approval Note" that warned Severson: "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 530.

Shortly after Severson completed his BLA, he filed an appeal of the tax assessed value of Parcel 9032 with King County. CP 738-42; CP 746; CP 1614-16. Severson's appeal was granted. *Id.* As a result, the tax assessed value of post-BLA Parcel 9032 was reduced from $198,600 to $60,000, and then further reduced to $50,000. CP 744; CP 746; CP 606.

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[7] The Petition omits the latter clause of the definition of "building site" set out in SMC § 19A.04.060, which allows the City to approve a BLA so long as the resulting lot is "currently legally developed." Pet. 6. The Washington State Court of Appeals noted the same omission in Severson's previous briefing as well. Pet. App. A-13.

E. After Re-Drawing Parcel 9032 to Be Fully Encumbered by Critical Areas, Severson Decried the City's Refusal to Grant an RUE to Further Develop Parcel 9032.

Elliot Severson formed Kinderace, LLC on September 18, 2012. CP 299. Two days later, he personally transferred ownership of post-BLA Parcel 9032 from his development corporation to Kinderace, LLC. CP 615-16. On June 17, 2013, Severson filed a lawsuit against the City in King County Superior Court, alleging post-BLA Parcel 9032 was the subject of a regulatory taking because the ECA Regulations precluded its [further] development. CP 1-6.

Notably, Severson failed to submit a development application for post-BLA Parcel 9032 before filing a takings lawsuit.[8] CP 1-6. In order to avoid dismissal for failure to do so, on July 5, 2013, Severson applied to the City for an RUE to build a Pagliacci Pizza store on post-BLA Parcel 9032. CP 56-65; CP 180; CP 182. The application stated that Kinderace (incorporated only one year earlier) had "owned the property for nine (9) years." CP 61. Severson contended that an RUE was warranted because, absent an RUE, he would be denied all reasonable use of post-BLA Parcel 9032.[9] That

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[8] The Petition misstates the sequence of events: Severson filed a lawsuit alleging a regulatory taking of Parcel 9032 before ever applying for an RUE to develop that parcel. Pet. 9; CP 1-6. In so doing, Severson demonstrated his use of the BLA was for the purpose of attempting to manufacture a takings claim. *Id*.

[9] Severson inaccurately describes Parcel 9032 in its current state. Pet. 16. It is not "taxed for its value as undeveloped commercial property," as Severson petitioned for a substantial reduction

argument ignored the substantial economic use derived from pre-BLA Parcel 9032 as a result of the highly profitable Project. CP 56-65.

While the takings case was pending, the City denied Severson's RUE application. CP 71-84. The City's Hearing Examiner affirmed the City's decision:

> 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 1793-94.

Severson appealed the Hearing Examiner's decision to King County Superior Court under Washington's Land Use Petition Act ("LUPA"), Wash. Rev. Code ch. 36.70C, and the LUPA case was consolidated with the takings case by stipulation. CP 2628-29. The takings claim was dismissed on summary judgment by the trial court, and the Washington State Court of Appeals affirmed. Pet. App. C-3, A-1.

The Washington State Court of Appeals held the trial court committed no error by dismissing the takings claim where, "[b]y means of a boundary line

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in its taxed assessed value due to the environmental constraints on the parcel, after obtaining the BLA. CP 744; CP 746; CP 606.

adjustment, Kinderace LLC created a new 32,850 square foot parcel of which all but 83 square feet had been designated by the City of Sammamish as environmentally critical areas and buffers."[10] Pet. App. A-1. The Court's analysis focuses exclusively on the import of the BLA, holding that:

> [E]ven if [the City] had determined that the proposed new Parcel 9032 was not developable without an exception for reasonable use, [the City] still could not have denied Kinderace's boundary line adjustment application when it met all of the requirements.[11] *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

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[10] Both the trial court and the Court of Appeals agreed that the BLA did not erase the development history of the original Parcel 9032. Pet. App. C-2 and A-11.

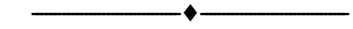
[11] The Petition erroneously states the City's approval of the BLA bears legal significance for the takings analysis, and that the City "requir[ed] that Severson construct the detention pond as a mandatory condition for approval of the development of adjacent Parcel 9058." Pet. 11. The former claim was briefed extensively by the parties, and the Court of Appeals noted Petitioner proffered no authority to support this claim. Pet. App. A-12. The latter statement is simply false, based on the record. CP 406-15; CP 1448; CP 1799; CP 386-98; CP 256; CP 265.

> legally developed" as part of the Plateau Professional Center. SMC 19A.04.060(2).

Pet. App. A-13. Moreover, the Washington State Court of Appeals affirmed the trial court's finding that the BLA did not erase the development history of Parcel 9032, and that "Kinderace had derived an economic use of new Parcel 9032 . . . at the time the [ECA] regulations were enacted." Pet. App. A-11. The Washington State Court of Appeals noted that to ignore the development history:

> [W]ould enable a property owner to subvert the environmental regulations by changing parcel boundaries [via a BLA] 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.

Id. The Washington State Supreme Court denied review. Pet. App. D-1.



REASONS FOR DENYING THE PETITION

Severson's Petition should be denied for five reasons.

First, the Washington State Court of Appeals' decision is based on an independent and adequate state law ground: the Washington State Court of Appeals held that a boundary line adjustment – a tool created by statute in Washington State – does not strip real

property of its development history and does not create parcels that are entitled to second economic uses.

Second, the Washington State Court of Appeals did not "aggregate" parcels in the manner posited in the Petition. Stated differently, this case does not present the question that this Court is asked to decide. The assertion that the Washington State Court of Appeals' decision here conflicts with decisions of this Court and other federal courts of appeals rests squarely on a mischaracterization of the Washington State Court of Appeals' ruling.

Third, *Murr v. Wisconsin*, 2015 WI App 13, 359 Wis. 2d 675, 859 N.W.2d 628 (Table) (2014), *cert. granted*, 136 S.Ct. 890 (2016), which arises under the "merger" doctrine, has no bearing whatsoever on the issues in this matter. There is no reason to hold this Petition pending *Murr*'s outcome.

Fourth, the decision below is a correct application of this Court's previous decisions.

Fifth and finally, the Washington State Court of Appeals identified the true concern of public policy at the heart of this matter. The Petition's appeal to policy should be rejected.

I. The Washington State Court of Appeals' Decision Rests on an Independent and Adequate State-Law Ground.

The Petition misstates the lower court's holding in an attempt to manufacture a federal question ripe for

review. Pet. i, 10. Although the Washington State Court of Appeals' decision mentions in passing the federal takings clause, its analysis and holding are solely focused on state-law takings jurisprudence, and more importantly, an independent state-law issue: whether a property owner in Washington State can use a BLA – a state statutory tool for adjusting the boundaries of existing lots – to create new economic value in a parcel from which that same owner had previously extracted substantial economic value. Pet. App. A-1, A-8 – A-14; Wash. Rev. Code § 58.17.040(6). The Washington State Court of Appeals rejected the claim that a BLA creates a new lot with a new bundle of property rights. Pet. App. A-11 – A-14. Thus, on this record – where Severson strategically used a BLA to reconfigure a parcel to render it fully encumbered by environmentally critical areas, after having already obtained a substantial economic use from the unencumbered portion of the original parcel – no takings claim can arise.

This Court accordingly lacks jurisdiction over this case because the Washington State Court of Appeals' decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (*citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). This Court will not review a question of federal law decided by a state court if the decision rests on a state ground that is independent of the federal question and adequate to support the judgment. *See, e.g.*, *Fox Film*, 296 U.S. at 210. "This principle applies whether the state law ground is substantive or

procedural." *Id.* "In the context of direct review of a State Court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman*, 501 U.S. at 729. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id*. (*citing Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)).

Severson's takings claim rested squarely on the aforementioned Washington statutory issue, as the Washington State Court of Appeals noted:

> [Petitioner] 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 RCW 58.17.040(6).**

Pet. App. A-9 (emphasis added). Thus, the largest part of the Washington State Court of Appeals' opinion grappled with state statutory concepts and state common law pertaining to the interpretation and application of Wash. Rev. Code § 58.17.040. Pet. App. A-9 – A-14. In so doing, the Washington State Court of Appeals "reject[ed] 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." Pet. App. A-12.

In reaching that holding, the Washington State Court of Appeals rejected Severson's argument that, under state law, a BLA "created new Parcel 9032 as a new legal lot that carries with it the right to some economically viable use." Pet. App. A-9. The Washington State Court of Appeals further rejected the claim that, under state and local law, "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." Pet. App. A-9 – A-11. The Washington State Court of Appeals rejected Severson's selective reading of SMC 19A.04.060, which actually defines "building site" as "an area of land, consisting of one or more lots or portions of lots" *either* (1) "capable of being developed" *or* (2) "[c]urrently legally developed," and found that Parcel 9032 was legally developed both before and after the BLA. Pet. App. A-12. The Washington State Court of Appeals agreed with the City that, under longstanding Washington law, the City faced civil penalties and fines if it denied the BLA. Pet. App. A-12 – A-14.

Importantly, Severson offers here no legal authority to support his theory that a BLA strips property of its prior economic use, and creates a right to further economic use. Pet. 18. The Washington State Court of Appeals distinguished the few state-law cases Severson relied upon, as none support this unusual – and dangerous – contention. *See* Pet. App. A-9 – A-11 (distinguishing *City of Seattle v. Crispin*, 149 Wash. 2d 896, 71 P.3d 208 (2003), and *Mason v. King County*, 134 Wash. App. 806, 808-9, 142 P.3d 637 (2006)).

The decision below rests on an independent and adequate state-law ground: the Washington State Court of Appeals decided that a BLA does not create a new legal lot with a new bundle of property rights, including the right to a second economic use. Pet. App. A-11. The Washington State Court of Appeals' interpretation of Wash. Rev. Code § 58.17.040 and related state and local laws properly led it to reject Severson's argument, and is adequate to support the judgment. Consequently, this Court should deny certiorari because it lacks jurisdiction over this case. *See Coleman*, 501 U.S. at 729.

II. This Case Does Not Present the Question Severson Asks This Court to Decide.

Severson urges 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" conflicts with federal and state authority, and "embraces a version of the relevant parcel rule that has never been endorsed by this Court." Pet. 13.

But this case does not present that issue. Severson is mistaken: this case did not involve the aggregation of development rights in contiguous parcels, but rather *one* parcel that Severson mined for its full and substantial economic value prior to the City's adoption of enhanced environmental regulations. Pet. App. A-11. On this record, the Washington State Court of Appeals did not rely on "development on an adjacent parcel" to

determine whether Parcel 9032 had provided Severson with an economic use; rather, it examined the development history of Parcel 9032 itself, and aptly held that no taking had occurred. Pet. 8; Pet. App. A-11. Aggregation is not at issue, and the Petition should be denied.

First, the Washington State Court of Appeals correctly held on this undisputed record that Parcel 9032 was fully developed *before* the City enacted stricter environmental regulations and *before* Severson requested a BLA to delineate a new, and fully encumbered, Parcel 9032. Pet. App. A-11 – A-14. Severson's plans and development proposal for Phase 2 of the Project reflect that the Project was designed to include *all* of Parcels 9058 *and* 9032. CP 382-84. Similarly, Severson admitted in 2004 – two years *before* the City adopted the ECA Regulations – that the southern portion of Parcel 9032 had no independent value as a building site because of the environmental regulations *existing in 2004*, and that the whole of Parcel 9032 "only has value as a storm drainage pond location." CP 265 (emphasis added). By developing Parcel 9032 as a stormwater pond, Severson extracted the parcel's full economic value.

Second, as a matter of law, the Washington State Court of Appeals held that Severson extracted *the available* economic benefit from Parcel 9032 by developing it as a stormwater pond *jointly* with Parcel 9058, and then selling Parcel 9058 for a substantial profit. Pet. App. A-2 – A-3. The BLA did not erase the development history of the original Parcel 9032, the

Washington State Court of Appeals held, and Severson accordingly was not entitled to a second economic use from reconfigured Parcel 9032. Pet. App. A-11 – A-14; *see Ventures Nw. Ltd. P'ship v. State*, 81 Wash. App. 353, 366, 914 P.2d 1180 (1996) (*citing Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926)); *see also Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Fed. Cir. 1981).

Third, Severson extracted the economic value from his land *before* the City adopted regulations that allegedly infringed on his ability to further use his property. The Washington State Court of Appeals applied black-letter law to find that no takings occurred on this record. Pet. App. A-8 – A-9; *see Guimont v. Clarke*, 121 Wash. 2d 586, 605, 854 P.2d 1 (1993) (*citing Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987)).[12] The undisputed record shows that Severson obtained a substantial economic use of Parcel 9032 *before* the City enacted the ECA Regulations in 2005. Pet. App. A-2 – A-3. Severson's use of a BLA to carve off the stormwater detention pond and leave the fully encumbered remainder did not alter the

[12] Severson's reliance on *Palazzolo v. Rhode Island*, 533 U.S. 606, 619-21 (2001) (which rejected the longstanding position that notice bars a taking) to discount this point of black-letter law is inapposite. This is not a case that invoked the notice rule. Rather, this case involves one actual owner – Severson – who extracted the economic value of a parcel, and then later: (1) objected to environment regulations that pre-dated his use of the property; and (2) used a BLA to create a fully encumbered parcel for the purpose of bringing a takings claim. On this record, to Severson, Parcel 9032 was of value as a stormwater detention pond – and nothing else. CP 265.

Court's analysis, due to a BLA's nature as a statutory tool (*see* Section I, above).

These were the legal issues raised by the parties and adjudicated by the Washington State Court of Appeals. Severson's arguments would be better decided in a case actually involving aggregation, such as *Murr*, 2015 WI App 13, ¶ 1 (discussed in Petition, Section III, below). On this record and the Washington State Court of Appeals' decision, this is simply not that case.

III. *Murr* and *Lost Tree Village* Bear No Relation to This Case.

Once again Severson misapplies the holding in this case in an attempt to equate it with an unrelated matter pending before this Court, *Murr*, 2015 WI App 13, ¶ 1. *Murr* presents an entirely unrelated issue: whether two separate lots that merged pursuant to a Wisconsin state law merger provision should constitute a single "parcel" for regulatory takings purposes. *Id*. Here, the Washington State Court of Appeals did not rely on "development on an adjacent parcel" to determine whether Parcel 9032 had provided Severson with an economic use; rather, it examined the development history of Parcel 9032 itself, and aptly held that no taking had occurred. Pet. App. A-11 – A-14. Whatever the outcome in *Murr*, it will not impact the Washington State Court of Appeals' holding here.

In *Murr*, the relevant parcels – Lots E and F – were both "substandard lots" based on local regulations adopted in 1975. 2015 WI App 13, ¶ 1. The 1975 regulations call for the merging of "adjacent substandard lots [when such lots] come under common ownership." *Id*. Lots E and F merged when the plaintiffs (a group of siblings) took title to both lots in two separate real estate transactions in 1994 and 1995. *Id*. at ¶ 6.

In 2006, the *Murr* plaintiffs sought a variance to allow development of Lots E and F as "separate building sites," circumventing the merger regulations. *See* 2015 WI App 13, ¶ 7. That variance was denied, which ultimately led to the plaintiffs bringing a takings claim. *Id*. The trial court dismissed the takings claim as time barred, and the Wisconsin Court of Appeals affirmed, stating that the plaintiffs "never possessed an unfettered 'right' to treat the lots separately." 2015 WI App 13, ¶ 29. The Court rejected the plaintiff's takings claim. *Id*. at ¶ 31.

Similarly, the aggregation matter of *Lost Tree Village Corporation v. United States*, 707 F.3d 1286, 1287 (Fed. Cir. 2013), *appeal docketed*, No. 15-1192, allegedly held by this Court pending the outcome in *Murr*, shows that Severson's attempt to equate this case with *Murr* is untenable. In *Lost Tree Village Corporation*, the Army Corps of Engineers denied the property owners' application to fill a wetland on a 4.99 acre parcel, which was surrounded by parcels lucratively developed by the same owner, on the basis that the owner "had very reasonable use of its land," inclusive of the neighboring, developed parcels. *Id*. at 1291. On appeal,

the Court of Appeals for the Federal Circuit held that the relevant parcel did not include the surrounding parcels, as the owner had "largely ignored" the subject parcel while developing its neighbors, but that the owner retained "distinct economic expectations" for each parcel. *Id*. at 1290. Here, by contrast, Severson actually developed the subject parcel (not just its neighbors), and his expectations for a second use of that same real property are immaterial to his unfounded claim of a legal right to a second economic use.

The outcome in *Murr* is immaterial to this case. The Washington State Court of Appeals correctly focused its inquiry on whether a property owner can use a BLA to create new economic value in a *single* parcel from which that same owner had previously extracted substantial economic value. *See* Pet. App. A-9 – A-10. Unlike in *Murr*, Severson derived an economic use from the entirety of the subject property (Parcel 9032) prior to the regulatory action. *Id*. Severson's factual admissions on this point render *Murr* of no import here: (1) but for the development of Parcel 9032 as an "off-site" stormwater detention pond, his investment in neighboring Parcel 9058 would have been lost; and (2) "[b]ecause of the environmental constraints on the parcel where the pond is located, it effectively has no value as a building site and only has value as a storm drainage pond location." CP 1448; CP 265. On this record, the Washington State Court of Appeals applied longstanding authority and aptly rejected the legally meritless claim that a BLA erases the development

history of a parcel that had already been lucratively mined of its economic value.

IV. The Decision Below Is a Correct Application of This Court's Decisions on Regulatory Takings.

Far from conflicting with any of this Court's case law, the Washington State Court of Appeals' decision – although primarily focused on the threshold state statutory issue discussed in Section I, herein – reflects a correct and straightforward application of settled U.S. Supreme Court precedent on regulatory takings, and shies away from any purported unsettled ground.

Based on settled law, the Washington State Court of Appeals held that Severson chose to use his property for a (lucrative) purpose, and is not legally entitled to a second use, regardless of his future plans for some *portion* of the property. *See* Pet. App. A-10 – A-12; *see, e.g.*, *Village of Euclid, Ohio*, 272 U.S. at 384; *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 334, 787 P.2d 907 (1990) (*citing Keystone Coal Ass'n*, 480 U.S. at 496–97, and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978)). The Washington State Court of Appeals held as a matter of Washington state law that a BLA does not strip the first economic use so as to make way for a second economic use. *See* Pet. App. A-10 – A-12.

Moreover, the Washington State Court of Appeals' decision follows *Penn Cent.* and its progeny, which cautions against a piecemeal takings claim that "divide[s] a single parcel into discrete segments." *Penn Cent.*, 438 U.S. at 130-31. Here, because the BLA did not erase the development history of Parcel 9032, the Washington State Court of Appeals rejected Severson's attempt to "divide a single parcel into discrete segments" – including one fully encumbered by existing environmental critical areas – and manufacture a takings claim. *Penn Central*, 438 U.S. at 130-31; *see also Presbytery*, 114 Wash. 2d at 334 (rejecting piecemealing, *i.e.*, permitting a takings claim where only a portion of a parcel is burdened by environmental regulations, while the other portion is capable of development and/or developed). To that end, the Washington State Court of Appeals' analysis properly focused on Parcel 9032 "as a whole," *before* it was split via a BLA. Pet. App. A-11 – A-14.

The Washington State Court of Appeals correctly noted that, for the purposes of a takings claim, the concept of an economically developed parcel applies to the whole of Parcel 9032, not just the portion containing a structure. *See* Pet. App. A-11 – A-12; *see Presbytery*, 114 Wash. 2d at 334-35 (*citing Keystone Bituminous Coal Ass'n*, 480 U.S. at 497). Subsequent modification of the boundaries is irrelevant because there has not been any additional government regulation. *See* Pet. App. A-12. Viewing the regulated parcel as a whole results in only one conclusion: no takings claim exists where Parcel 9032 had already been put to a substantial

economic use at the time the new ECA Regulations were adopted.

The Washington State Court of Appeals likewise paid due credit to the inherent value of post-BLA Parcel 9032 and any reasonable investment-backed expectations, as outlined in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992). Pet. App. A-4 – A-5. Severson's subjective intent to develop the portion of Parcel 9032 south of the Creek is presented in a self-serving declaration, and the record is replete with contrary documentary and testimonial evidence disproving his testimony regarding his expectations. *See* Pet. 5 (*citing* CP 2153). Severson himself testified that Parcel 9032 was purchased for use as a stormwater detention pond and could not house any other structure. CP 1448; CP 265. Severson's design documents included the whole of Parcel 9032. CP 382-84. Severson successfully petitioned to reduce the tax assessed value of post-BLA Parcel 9032 on the basis that it was undevelopable. CP 738-42; CP 746; CP 1614-16.

Severson's investment-backed expectations for Parcel 9032 were met when it was utilized for a storm water detention pond. Parcel 9032's value was substantial: reflecting the value gained from the acquisition and use of Parcel 9032 as the pond, Severson sold the more intensely developed Parcel 9058 for $3,815,000. CP 524-25. But for the inclusion of Parcel 9032 in that development, according to Severson, Phase 2 of the Project would have been a loss. CP 1448; CP 1505-06. As in *Lucas*, Severson suffered

no "deprivation [that] is contrary to [his] reasonable, investment-backed expectations." *Lucas*, 505 U.S. at 1034. The Washington State Court of Appeals' decision is sound.

V. Severson's Appeal to Public Policy Is Disingenuous.

Severson's appeal to the policy concerns underpinning the takings doctrine fall flat and do not form a valid reason to grant review. Pet. 18-19. Yes, the Washington State Court of Appeals correctly focused "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." Pet. 19 (*citing Forest Prop., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)); Pet. App. A-11 – A-12. Nevertheless, Severson's economic expectations are well documented in the undisputed record, as is the substantial economic use he derived from the subject property. *Id*. Moreover, the Washington State Court of Appeals identified the actual public policy concern at the heart of this case: the strategic behavior by landowners to "manufacture" takings claims by using the BLA process. Pet. App. A-11.

The Washington State Court of Appeals held that Severson is not entitled to compensation, and "[t]o hold otherwise would enable a property owner to subvert the environmental regulations by changing parcel boundaries to consolidate critical areas." *Id*. Again, Severson chose to use his property for a (lucrative)

purpose, and he is not legally entitled to a second use, regardless of his future plans for some *portion* of the property. *See, e.g.*, *Village of Euclid, Ohio*, 272 U.S. at 384.

Rejecting Severson's takings claim in no way threatens to "deprive developers of the protections guaranteed by the Takings Clause by always exaggerating the denominator in the takings calculus." Pet. 19. Rather, the decision below wisely impedes the exploitation of takings law where a developer has derived a substantial economic use of his property, and then knowingly alters the boundaries of the property to delineate a parcel fully encumbered by a stream and its buffers. This Court need only look to the undisputed facts to conclude that this case does not present a factual scenario warranting review.

This is not a case where the City adopted restrictive environmental regulations that later harmed an innocent property owner's investment-backed expectations. Rather, this case involves a savvy property owner who used an administrative tool to *create* a fully encumbered parcel, so as to coerce the City to grant an RUE or face a takings lawsuit.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted this 4th day of May, 2017.

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