No. 16-1194

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

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "relevant parcel" 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 issue raises a critical and unresolved question of constitutional law that is currently pending before this Court in *Murr v. State of Wisconsin*, Dkt. No. 15-214.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Sammamish opposes Kinderace's (Elliot Severson's) petition on several grounds, most of which are unrelated to the question presented, and none of which has any merit. First, the City rewrites the question presented to shift focus away from the lower court's relevant parcel determination, asking instead whether the court properly resolved the merits of Severson's regulatory takings claim. Opp. at i; 18-21, 24-27. Determination of the relevant parcel, however, is a threshold issue in a regulatory takings case because it provides the denominator against which the impact of regulations must be measured. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987). Thus, the City's rewritten issue statement merely begs the question presented.

Second, the City argues that review is not warranted because the lower court decided this case on an independent state-law basis. Opp. at 14-18. Not so. According to the Washington court, the relevant parcel determination—indeed, the entire regulatory takings analysis—was based on federal takings law. Pet. App. A at 8. The fact that the lower court referenced state property law when discussing the extent of Severson's

property rights is a ubiquitous feature of takings law and does not provide an independent basis to uphold the decision below.[1]

Third, the City claims the petition does not identify issues worthy of this Court's review. It does so by rephrasing the lower court's relevant parcel determination as an application of a per se rule holding that, once a landowner makes an economic use of his property, the owner "is not legally entitled to a second use, regardless of his future plans for some portion of the property." Opp. at 24. The City is wrong. That conclusion plainly constitutes a determination of the residual value of the property—thus, it is the relevant parcel determination. And, insofar as the lower court adopted a rule that property owners have no development rights in their land once they make an economic use of it, the decision conflicts with decisions from other courts. *See*, *e.g.*, *Warren Trust v. United States*, 107 Fed. Cl. 533, 563-64 (2012) (discussing cases where prior development is considered as part of a relevant parcel determination).

The City also attempts to justify the lower court's decision by rearguing the underlying facts of this case—primarily contesting Severson's investment-backed expectations when he purchased Parcel 9032. Opp. at 2-11. Notably, none of the lower courts entered findings crediting the City's argument, rendering the City's claims irrelevant to the petition. The lower courts resolved all factual issues necessary to decide this petition: (1) Severson purchased Parcel 9032 prior

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[1] Courts look to state law to define property interests. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010) (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)).

to the City's adoption of its critical areas ordinance (Pet. App. A at 2-3); (2) Severson later conveyed the detention pond to the new owners of Parcel 9058 (Pet. App. A at 5-6); and (3) the City applied its new critical areas ordinance to deny all new development on Parcel 9032, which remains zoned and taxed as commercial property. Pet. App. A at 3-4, 7. These facts cannot be contested.

Fourth, the City argues that the decision below is distinguishable from *Murr v. State of Wisconsin*, Dkt. No. 15-214 (pending on the merits), and *Lost Tree Village Corporation v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013) (certiorari petition pending No. 15-1192). In making this argument, however, the City focuses on the differences arising from distinct land use proposals, ignoring the common legal question of how a court determines the relevant parcel when an owner has an interest in adjacent development.

Ultimately, the City does not contest that the relevant parcel inquiry raises an important question of federal constitutional law upon which the lower courts are divided. This Court's decision in *Murr* will likely offer a framework for deciding the relevant parcel question and this case. Certiorari is therefore warranted and this Court should grant review and hold the case pending the decision in *Murr* and the resolution of the *Lost Tree Village* petition.

CORRECTION TO CITY'S STATEMENT OF FACTS

The City's "statement of facts" largely consists of an argument contesting Severson's expectations when

he purchased Parcel 9032. Opp. at 2-13. In fact, the City only cites the lower court's decision four times across its 12-page rendition of "facts," relying instead on inferences from trial court exhibits. Opp. at 2-11. Notably, none of the lower courts entered findings supporting the City's arguments in regard to Severson's investment-backed expectations. Thus, its rendition of the facts is irrelevant to the question whether the lower court's determination of the relevant parcel conflicts with *Penn Central*.

Even so, the City's "facts" are misleading. The record plainly establishes that Severson intended to develop the unused portion of the commercial parcel, which was expressly allowed by the City's code and critical areas regulations at the time he purchased the property and at the time he agreed to install the detention pond. *See* Pet. App. A at 3-7 (detailing Severson's attempts to develop the property); Petition at 4-5 (detailing Severson's investment in developing the land); Petition at 6-7 (discussing regulations in effect at time of purchase). Indeed, Severson invested years and hundreds of thousands of dollars developing alternative proposals to develop the property in accordance with the City's pre-2005 and post-2005 critical areas requirements.

Although immaterial to the question presented, it is also necessary to correct the City's repeated contention that Severson "admitted" that the only value in Parcel 9032 was its use as a location for a detention pond. Not so. *See* Pet. App. E (maps showing buildable areas at time of purchase). Again, the City only offers this Court its own self-serving inferences from (1) a checklist submitted before Severson purchased Parcel 9032 (CP 797), and (2) a

letter in which Severson's agent stated that the northern portion of Parcel 9032 could only be developed as a detention pond. CP 265. Severson contested the City's inferences below,[2] and none of the state courts credited the City's argument. The City's decision to raise a factual dispute at this stage of review is nothing more than an attempt to distract this Court from the relevant parcel question.

So, too, is the City's misleading claim that Severson "lucratively developed" Parcel 9032 prior to the boundary line adjustment. Opp. at 1, 2, 4, 22, 24, 27. In truth, all commercial development occurred on the neighboring Parcel 9058. Pet. App. A at 4-5. The City code required that Severson install a storm water detention facility, which was located on an otherwise non-developable portion of Parcel 9032. *Id*. Severson later conveyed that portion of Parcel 9032 to the purchaser of Parcel 9058 and combined the detention pond with Parcel 9058 via an approved boundary lot adjustment. *Id.* Contrary to the City's contention, there is no finding below that Severson purchased Parcel 9032—a 0.75-acre parcel of vacant, commercially zoned property—for the sole purpose of installing the pond. The City's arguments in this regard must be disregarded.

The City's accusation that Severson applied for a boundary line adjustment in order to "manufacture" a regulatory takings claim is absurd. Opp. at 27-28. The suggestion that any businessman would invest years of effort and hundreds of thousands of dollars on consultants and lawyers and submit multiple development proposals and mitigation studies just to

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[2] *See* Declaration of Elliot Severson (CP 2153), quoted in Petition at 4-5.

"gin up" a risky lawsuit is beyond reasonable belief and does not warrant this Court's attention.

Finally, the City's summary of the decision below is also incomplete and misleading. The opposition brief skips past the lower court's relevant parcel determination (Pet. App. A at 8-10) to focus instead on the court's conclusion that no taking occurred. Opp. at 12-13 (citing Pet. App. A at 13). The City's omission is an attempt to redirect the Court's attention from the threshold determination of the relevant parcel to the subsequent question whether the lower court properly considered the effect of the critical areas ordinance on the parcel as a whole. Opp. at i, 14-18. The answer to that question, of course, cannot be arrived at without first addressing the relevant parcel question.

ARGUMENT

I

THIS COURT HAS JURISDICTION; THERE ARE NO INDEPENDENT STATE-LAW GROUNDS FOR THE DECISION BELOW

The City does not dispute that this Court has jurisdiction under 28 U.S.C. § 1257(a). Instead, the City argues review should be denied because there is an independent state-law basis for upholding the lower court's decision. Not so.

The question presented focuses on the relevant parcel question, which is a "crucial antecedent that determines the extent of the economic impact wrought

by the regulation." *Lost Tree Village*, 707 F.3d at 1292. The City's supposed "independent state-law ground" argument focuses on the lower court's subsequent resolution of the regulatory takings claim on the merits. Opp. at 14-18. That aspect of its decision, however, occurred after and was inextricable from the relevant parcel determination. *Keystone*, 480 U.S. at 497. There is no way the lower court could weigh the economic impact of the City's critical areas ordinance against the residual value in Severson's property without implicating the relevant parcel question. Thus, the decision on the merits cannot provide an independent basis for affirming the opinion below.

Moreover, this Court will only decline jurisdiction where "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds[.]" *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The Washington court did not do so. Instead, it stated in its decision that it decided the case under the Takings Clauses of both the Washington and U.S. Constitutions. Pet. App. A at 8; *see also* Opp. at 20; 24-27 (arguing that the lower court followed this Court's takings case law). The City's argument is without merit.

II

THE DECISION OF THE WASHINGTON APPELLATE COURT RAISES AN IMPORTANT QUESTION OF FEDERAL TAKINGS LAW

In determining the relevant parcel, the Washington court adopted two rules of federal takings law that significantly limit the protections guaranteed

by the Fifth Amendment to the U.S. Constitution. Pet. App. A at 8-10. First, the court held that the enactment of a land-use regulation—the critical areas ordinance—will determine an owner's rights in his or her land. *Id.* And second, the court held that prior development will establish the value of the subject property—even where the improvement was lawfully conveyed to another person. *Id.* Both rules conflict with this Court's regulatory takings case law and put property owners' rights at risk.

Contrary to the City's contentions, those two rules are readily apparent in the decision below. The conclusion that Severson extracted all economic value from his vacant commercial property when he located a detention pond on a corner of the lot constitutes a determination of the relevant parcel. Pet. App. A at 8-10. Necessary to that determination is the premise that the relevant parcel was the configuration of the lot *after* the City enacted its new critical areas ordinance.[3] The court's determination also failed to consider the legal metes and bounds of the lot after the pond was conveyed to the neighboring property owner; adopting a rule that historic development will be considered the parcel as a whole, regardless of any other residual value in the property. *Id.*

The City does not meaningfully address the lower court's relevant parcel determination. Instead, the City broadly asserts that the court faithfully followed *Penn Central* and *Keystone* when determining the parcel as a whole. Opp. at 24-25. The City is wrong

[3] The version of the ordinance in effect when Severson purchased the parcel only imposed a 25-foot stream buffer, leaving most of the southern portion of the lot available for commercial development. Pet. App. E.

for several reasons. First, this Court's discussion of the parcel as a whole in *Penn Central* and *Keystone* did not provide clear guidance for how to determine the relevant parcel, resulting in a nationwide split of authority. *See 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"). Thus, the decision below only adds to the growing split of authority—it is up to this Court to say whether or not the decision is correct.

Second, the City claims that the lower court was following *Penn Central* and *Keystone* when it held that, once a landowner makes any economic use of his property, the owner "is not legally entitled to a second use, regardless of his future plans for some portion of the property."[4] Opp. at 24-25. Again, the City is wrong—there is no federal rule limiting property owners to one single use in the lifetime of a lot. *See Warren Trust*, 107 Fed. Cl. at 563-64. Indeed, the relevant parcel inquiry is intended to determine the residual value of a property at the time a regulation is applied to deny a development application—a determination that necessarily takes into consideration both prior and allowable future uses. *Penn Central*, 438 U.S. at 130-31.

The lower court's conclusion that any historic use of a parcel of property will preclude a regulatory taking claim directly conflicts with *Penn Central* which requires the court to analyze several ad hoc factors,

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[4] The City also mistakenly relies on *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926). *Euclid* involved a substantive due process challenge to the enactment of a zoning ordinance and was decided 50 years before *Penn Central*, which first announced the parcel as a whole inquiry.

including existing uses, when evaluating a takings claim. 438 U.S. at 123-24 ; *see also Palazzolo*, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors . . . ."). The lower court's adoption of a per se rule in place of this Court's ad hoc inquiry conflicts with a fundamental tenet of takings law:

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 133 S. Ct. 511, 518 (2012).

Third, the City's argument that the critical areas ordinance was determinative of Severson's development rights conflicts with decisions of this Court's holding that the government's adoption of a regulation cannot extinguish an owner's rights in his or her property. *Palazzolo*, 533 U.S. at 628 ("[A] State, by ipse dixit, may not transform private property into public property without compensation." (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980))). The lower court's error is plain: the impact of a regulation provides the numerator for the takings equation. *Keystone*, 480 U.S. at 496. That impact is to be measured against the residual value of the property—the denominator. *Id*. The lower court's conclusion that Severson had no development rights in Parcel 9032 *after* the City enacted its new critical areas

ordinance made the regulatory impact both the numerator and denominator, rendering the takings equation meaningless (measuring the regulatory impact against the uses allowed by the regulation will always result in a determination of no impact).

Finally, the City's attempt to distinguish the relevant parcel determination in this case from those in *Murr* and *Lost Tree Village* is unconvincing. Certainly, the fact that each case involves a unique land-use proposal will result in different fact patterns, but each case shares the common legal question: how does the court determine the relevant parcel where the owner has an interest in adjacent land? In *Murr*, the state court held that the family had no development rights in a vacant parcel of land based on a state statute deeming certain properties "merged." That conclusion is not meaningfully distinguishable from the decision below, which held that the City's enactment of its new critical areas ordinance extinguished Severson's development rights in Parcel 9032; thus, the location of the pond constituted the full value of the vacant commercial property. Pet. App. A at 8-10.

The Federal Circuit reached an opposite conclusion in *Lost Tree Village*. It first held that enactment of an environmental regulation constitutes a restriction on property rights. *Lost Tree Village*, 707 F.3d at 1291-92. Second, the court held that an owner's interest in adjacent parcels, standing alone, is an insufficient basis upon which to aggregate development rights when determining the relevant parcel. *Lost Tree Village*, 707 F.3d at 1294. Instead, the court considers a variety of factors, including the owner's investment-backed expectations. *Id*. Thus,

under the reasoning of *Lost Tree Village*, Severson would be entitled to show that, at the time he purchased Parcel 9032, he had valuable rights on the southern portion of the lot and the enactment of the new critical areas ordinance deprived him of those rights. *See also Palazzolo*, 533 U.S. at 628.

There is no meaningful difference between the legal questions decided in *Murr*, *Lost Tree Village*, and the present case. Certiorari is warranted.

CONCLUSION

The petition for writ of certiorari should be granted and held pending this Court's decision in *Murr* and the resolution of the *Lost Tree Village* certiorari petition.

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Respectfully submitted,

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