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By Email (pdc@bainbridgewa.gov) Only
City of Bainbridge Island Planning Commission
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Re: Comments on Proposed Historic Preservation Ordinance 2016-15

Dear Planning Commission Members:

My firm represent Bruce and Peggy Brunton. They own mixed-use property within the City of Bainbridge Island. The property is on lower Erickson Avenue. Their property may be affected by the proposed ordinance. My clients are coordinating comment with other affected property owners.

Mr. and Mrs. Brunton want to be clear: they do not oppose historic preservation in general and are willing to consider reasonable regulation.

Their concerns at this point in the process are three: (1) the lack of opportunity to date for the public to meaningfully participate and comment on the proposal; (2) the obligation to consider statutory and constitutional limits on government to regulate private property rights; and (3) needed drafting to make the proposal more understandable, internally consistent and compliant with legal requirements.

The latter will be addressed by other speakers and property owners; the Bruntons set out their comments on (1) and (2), immediately below.

Mr. Brunton will orally provide comment tonight on a related, but slightly separate matter, that is, how the Historic Preservation Commission designates properties on its Inventory of Historic Places, List of Register-Eligible Properties and List of Properties Designated for Listing On Local Register of Historic Places, and how this designation can negatively impact private ownership rights.

Process.

An historic preservation ordinance is a development regulation under the Growth Management Act, RCW 36.70A. Thus, its possible adoption invokes the procedural requirements of the Act. These include notice and provision of adequate opportunity of the public to participate and meaningfully comment. *See* RCW 36.70A.035. I refer the Planning Commission to Resolution No.2014-23(Public Participation Program) for the detailed requirements, responsibilities and obligations.

Mr. Brunton believes there has not been fair opportunity for the public to participate in drafting the proposal nor opportunity to comment on new drafts. He will explain his concerns on this in more detail this evening, as we expect will other speakers.

Statutory/Constitutional Limitations.

(1) The Protected Property Right

The term "property" refers to the collection of protected rights inhering in an individual's relationship to his or her land. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945). Among these are the rights to possess, use, exclude others, and dispose of the property. *Id.*; *see also Wash. 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.). Each of these property rights are protected by the constitution. *Manufactured Hous. Communities of Washington v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000).

For purposes of protection under the Washington State and Federal Constitutions, "[p]roperty in a thing consists not merely in its ownership and possession but also in the unrestricted right of use, enjoyment and disposal." *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) (emphasis supplied). Such ownership and development rights constitute a fundamental attribute of property ownership. *Id.* The right to build on one's property is a fundamental attribute of property ownership and exists without regard to zoning laws, which operate as restrictions on the use of property. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (the "right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'"); *River Park v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest.

Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property."); *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (It is well established that "'[t]he right of [an owner] to devote [her] land to any legitimate use is properly within the protection of the Constitution.'") (citations omitted). This concept is

essential in a land use appeal: a person's property rights exist regardless of the regulatory restrictions that seek to subsequently burden those rights. *See Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (explaining that government cannot extinguish a person's rights in his or her property by regulation).

(2) Statutory Limitations

The GMA provides for protection of private property rights ("Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions."). *See* RCW 36.70A.020(6),

RCW 82.02 precludes an illegal exaction on urban development or use. Specifically, RCW 82.02.020 prohibits municipalities from imposing a "tax, fee, or charge, either direct or indirect, on ...the development, subdivision, classification or reclassification of land" unless "reasonably necessary as a direct result of the proposed development or plat."

An exaction of land by imposition of a development prohibition to achieve a purported public benefit is considered a "tax" under RCW 82.02.

The Washington courts have interpreted RCW 82.02.020 to contain a requirement that local government establish a "nexus" between a restriction on the development of property and the identified impact on a "public problem," as well as a limitation that a developer's required contribution to the solution of the problem be proportionate to the developer's or property owner's contribution to the problem itself.

To meet RCW 82.02.020's "reasonably necessary" requirement, an ordinance containing a development condition or exaction must be tied to a specific, identified impact of a development on a community:

> [A condition on development] must "mitigate a direct impact that has been identified as a consequence of a proposed development" . . . reflects the legislature's adoption of the "nexus" requirement imposed by case law on governmental exactions and conditions. *Nollan v. California Coastal Comm'n*, 384, U.S. 825 (1987). Simply stated, there must be a nexus, a direct connection, 'between the condition and the original purpose of the building restriction." *Nollan*, 483 U.S. at 837. Where the exaction or other condition does not mitigate an impact of the development, it is an unlawful exercise of police power. *Unlimited v. Kitsap Cy.*, 50 Wn. App. 723, 727 (1988).

Cobb v. Snohomish County, 64, Wn. App. 451, 467-68 (Agid J., concurring and dissenting in part) (Internal citations modified); *see also Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761 (2002); *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 242-44 (1994).

Most important, RCW 82.02.020 places the burden on the local government to demonstrate nexus. *See Isla Verde*, 146 Wn.2d 755056; *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 340 (2007). To do so, a local government "must show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn.App. 505, 521 (1998).

This means that a local government must demonstrate a nexus between the condition and the impact caused by development to legally impose project mitigation. *Nollan*, 483, U.S. 837 (1987). *See also* R. S. Radford, *Of Course a Land Use Regulation That Fails to Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (local government must demonstrate "a close casual nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property's unregulated use.") "It is the requirement of a cause-effect nexus, not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners." R.S. Radford, IId. At 391.

Mr. Brunton is not working with the "outer limits" of the law. The statutory requirements set out in RCW Chapter 82.02 have been applied many times to strike down government imposed mitigation if no showing of direct impacts caused by a proposed project was made. *See Sparks v. Douglas County*, 127 Wn.2d 901, 915, 904 P.2d 738 (1995) (applicable to dedication of right of way as condition of plat approval); *United Development Corp. v. City of Mill Creek,* 106 Wn. App. 681, 698, 26 P.3d 943 (2001) (applicable where condition required frontage improvements for drainage along adjacent boulevard); *Castle Homes &Dev., Inc. v. City of Brier,* 76 Wn. App. 95, 882 Pl2d 1172 (1994) (applicable where voluntary agreement required payment of $3000 per lot or provision of offsite traffic improvements); *Isla Verde Int'l Holdings, Inc. v. City Camas,* 146 Wn.2d 740, 49 P.3d 867 (2002) (30% generic open space set aside unlawful).

(3) <u>Constitutional Restrictions</u>

Addressing constitutional standards, case law establishes rigorous requirements for nexus and proportionality which have been set forth by the United States Supreme Court and elaborated upon in Washington. *See. e.g., Nollan v. Cal. Coastal Comm'n, supra.; Dolan v. City of Tigard, supra.*; *Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground,* 146 Wn.2d 685, 695, 49 P.3d 860 (2002); *Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (County

conditioning of approval of a three-lot short plat on the landowner's dedication of road right-of-way constitutes unconstitutional taking).

The reason for requiring the municipality to demonstrate the impact of the development is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Turning to application of the constitutional standards, a restriction on development must be roughly proportional to the impact the proposed development. *See Benchmark Land Co. v. City of Battle Ground,* 94 Wn. App. at 548; *See Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show "essential nexus" between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is "roughly proportional" to the impacts of the proposed development).

Thank you for your kind attention to these comments. We will provide an analysis of the "historic preservation" cases in due course, to aid the process.

Very truly yours,

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