The Honorable Barbara A. Mack
Hearing set for **Friday, June 17, 2016, at 10:00 AM**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

BENDARE DUNDAT, INC., Plaintiff, and MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES, Intervenor, vs. CITY OF SEATTLE, Defendant.	No. 16-2-08259-9 SEA CITY'S REPLY REGARDING ITS MOTION TO DISMISS

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- Seattle Department of Constructions and Inspections, Tip 201: MASTER USE PERMIT (MUP) OVERVIEW (June 2, 2011).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Although Bendare proved it complied with RCW 7.24.110's requirement to serve its Complaint on the Attorney General, the Court should still dismiss this case on any of the other four alternative grounds the City presents because Bendare can offer no set of facts consistent with its Complaint entitling Bendare to relief.[1]

A. This suit is untimely.

The simplest basis for dismissal is untimeliness. This motion is governed by *Brutsche*, a copy of which is attached.[2] Just like this case, *Brutsche* involved a land use ordinance (a rezone of 305 acres of downtown Kent), not a land use decision on a project application.[3] Like Bendare alleges, the plaintiff in *Brutsche* sought facial declaratory relief and no damages.[4] As with Bendare, none of the grounds for relief asserted in *Brutsche* provided a limitations period.[5] Faced with the situation Bendare now presents, *Brutsche* followed the rule that a declaratory judgment action must be brought within a "reasonable time" determined by analogy to the period allowed by law for challenging a similar action.[6]

Bendare urges a course at odds with *Brutsche*: look for no analogous limitations period and declare a "reasonable time" is *any* time.[7] That is not the law.

Brutsche concluded the analogous period was 30 days from adoption of the ordinance, reasoning it was generally used for appeals of land use decisions and uniformity suggested a

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[1] *See Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (standard for motions to dismiss).

[2] *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995).

[3] *Id.*, 78 Wn. App. at 372-73; Response at 7. Bendare incorrectly casts *Brutsche* as involving the rezone of a limited area. Response at 11. *Cf. Brutsche*, 78 Wn. App. at 372, 379, 380 n.8 (describing the ordinance as an area-wide rezone); RCW 36.70C.020(2)(a) (excluding area-wide rezones from the definition of "land use decision").

[4] *Brutsche*, 78 Wn. App. at 372-76; Response at 6.

[5] *Brutsche*, 78 Wn. App. at 373-76; Response at 7.

[6] *Brutsche*, 78 Wn. App. at 376-80.

[7] *See* Response at 10-12.

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Seattle City Attorney
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consistent period for appeals of land use regulations.[8] Since *Brutsche*, the Legislature reduced the period to challenge a final land use decision to 21 days, and the appeal period to challenge a land use regulation under the Growth Management Act ("GMA") is 60 days.[9] Even under the more generous 60-day period, Bendare filed this case months too late. It is untimely.

B. This as-applied challenge is not appropriate for declaratory relief.

Bendare agrees declaratory judgment is not appropriate for as-applied challenges but claims that "[i]n effect, this is a facial challenge."[10] Bendare's words undermine its claim. Bendare challenges the Regulation "not only as applied to Bendare's project but also as applied to all other projects subject to [the Regulation]."[11] That echoes the Complaint, which twice requests a declaration that the Regulation is invalid "as applied" to Bendare.[12]

Bendare does not respond to the authority and arguments the City offers for why this is an as-applied challenge.[13] Bendare does not address *Tapps Brewing*, which explained the difference between facial and as-applied challenges and held a claim to be as-applied where it rested on facial and as-applied grounds. Bendare does not address how its claims of "reasonable necessity," "rough proportionality," and "undue oppression" can be assessed in a facial vacuum without facts of actual cases. And Bendare does not dispute that, as a matter of law, it cannot

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[8] *Brutsche*, 78 Wn. App. at 379-80.

[9] *See* RCW 36.70C.040(4) (Land Use Petition Act, "LUPA"); RCW 26.70A.290(2) (GMA). LUPA was adopted in 1995, after *Brutsche* was filed in 1992. *See* Laws of 1995, ch. 347. The GMA appeal period was adopted in 1991, which might explain why no party offered it as the analogous period. *See* Laws of 1991, Spec. Sess., ch. 32, § 10.

[10] Response at 6, lines 3-5, 14-15.

[11] *Id.*, lines 13-14. Bendare lacks standing to raise others' rights. *See Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

[12] Complaint §§ 4.2.3 and 5.2.

[13] *See* City's Motion at 5-7.

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maintain a facial takings claim absent an assertion—unsupportable here—that the Regulation constitutes a physical invasion of property or denies all economically viable use of the property.

Bendare instead assails a mischaracterization of the City's argument, claiming the City relies on the issue being the outcome of Bendare's application process, not the process itself.[14] That argument misses the point. Of course Bendare challenges a process it wishes to avoid. But that challenge is necessarily as-applied because we need facts to know which fees or costs the Regulation (and not other factors) causes Bendare to incur, how much, and whether they are "reasonably necessary," "roughly proportional," or "unduly oppressive."

C. This case is not justiciable.

This action is not justiciable because, before Bendare goes through the process it seeks to avoid, Bendare can allege no conceivable set of facts about which fees or costs the Regulation causes, or how much.[15] Those facts are unknowable now; they may arise later, but that only proves this case is not justiciable as presented. To the extent Bendare suggests the Regulation already caused Bendare to conduct SEPA review, that suggestion is inadmissible because it contradicts the Complaint's allegation that the City required SEPA review because of steep slope issues, not the Regulation.[16] Bendare also suggests facts regarding its past investments in the property and permitting process,[17] but such claims are irrelevant to the amount of fees and costs the Regulation has caused or will cause. The City could not, and did not, "admit" the amount of

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[14] Response at 5-6.

[15] *See Bravo*, 125 Wn.2d at 750 ("the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived"). The City relies on its motion regarding the other justiciability elements.

[16] *See id.* (any hypothetical facts offered in response to a motion to dismiss must be consistent with the complaint). *Compare* Complaint §§ 3.3.1 and 3.4.3 (Bendare became subject to the Regulation either January 28 or February 5, 2016) *with id.* § 3.4.2 (SEPA review was triggered by steep slope considerations in December 2015).

[17] Response at 9, lines 3-7, 11-13. Bendare cites Complaint §§ 3.4.1, 3.4.2, 3.5.1, and 3.5.2, but none of them mentions those details.

Peter S. Holmes
Seattle City Attorney
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Seattle, WA 98104-7097
(206) 684-8200

time and fees the Regulation will cause Bendare to spend on design and SEPA review.[18] The City merely published a document five years ago with a "table provid[ing] information about estimated costs and timelines," none of which informs the situation Bendare presents.[19] The key factual issues will remain awash in speculation until Bendare completes the permitting process. This case cannot be resolved on guesswork.

D. Bendare has other adequate remedies.

Bendare has adequate alternative remedies it can pursue at the appropriate time. The City agrees Bendare is not attempting to pursue a LUPA action or damages now; such claims would be premature.[20] But the issue is not what Bendare is doing in its declaratory judgment action; the issue is what Bendare could do in the alternative.

Berst is not on point. It did not involve, as Bendare claims, the validity of a land use procedure imposed on an applicant.[21] It involved a challenge to a moratorium that prevented the local jurisdiction from issuing a land use decision on an application—it barred permitting procedures. *Berst* held that adopting the moratorium was not a land use decision subject to LUPA, adding a footnote to contrast *Grandmaster*, which the City's motion invokes and Bendare ignores.[22] *Grandmaster*, like this case and unlike *Berst*, involved a claim about the permitting process a property owner had to pursue, and "there [was] no serious dispute" that the local government would ultimately make a "land use decision" subject to LUPA's exclusive

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[18] *Cf.* Response at 8, lines 23-25.

[19] Seattle Dept. of Constructions and Inspections, Tip 201: MASTER USE PERMIT (MUP) OVERVIEW at 2 (upper right column) and 4 (June 2, 2011). A copy of Tip 201 is attached. *See* ER 201(b) (allowing judicial notice).

[20] *See* Response at 7-8.

[21] *See id.* (citing *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2003)).

[22] *Berst*, 114 Wn. App. at 254 n.17 (providing a "cf." citation to *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002)).

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Seattle City Attorney
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Seattle, WA 98104-7097
(206) 684-8200

jurisdiction.[23] Under LUPA, Bendare could challenge the decision on a variety of grounds, including that it violates Bendare's constitutional rights, is outside the City's authority, is an erroneous interpretation of the law, or is the product of an unlawful procedure—all of which resonate with Bendare's Complaint.[24]

Bendare could join claims for damages under state or federal law to make Bendare whole. Bendare does not contend it could not bring damage claims later, only that it is not doing so now and does not want to later. Again, all that matters is whether the alternatives would be available at the appropriate time. Bendare does not claim they won't.

This case should be dismissed. It is an untimely, as-applied challenge that is not yet justiciable. Bendare may challenge the Regulation and be made whole if Bendare completes the permitting process. This declaratory judgment action is not the proper vehicle for addressing Bendare's concerns.

Respectfully submitted June 15, 2016.

s/Roger D. Wynne, WSBA #23399
s/Erin Ferguson, WSBA # 39535
Assistant City Attorneys
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98101-7097
Ph: (206) 684-8200
Fax: (206) 684-8284
E-mail: roger.wynne@seattle.gov
and erin.ferguson@seattle.gov
Attorneys for Defendant City of Seattle

[23] *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 99-100. The plaintiff in *Grandmaster*, a neighbor opposed to a mine project, argued the applicant, in addition to obtaining the permits for which it has already applied, also needed to go through the process of obtaining a conditional use permit. *Id.* at 96-97.

[24] RCW 36.70C.130(1).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the following documents:

City's Reply Regarding Its Motion to Dismiss; and

[2nd Proposed] Order Granting City's Motion to Dismiss

with the Clerk of the Court using the ECR system, which will send notification of the filing to the following:

Patrick J. Schneider
schnp@foster.com
Jacqueline C. Quarre
Jacquie.quarre@foster.com
Duana T. Koloušková
kolouskova@jmmlaw.com

Dated this 15th day of June, 2016 at Seattle, Washington

s/Alicia Reise
ALICIA REISE, Legal Assistant

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200