Judge _____
January 31, 2024 9:30 am
Department _____
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

NATHAN RIMMER,

Plaintiff,

v.

CITY OF EDMONDS, a municipal corporation of the State of Washington,

Defendant.

No. 23-2-05426-31

Plaintiff's Motion for Summary Judgment and Application for Alternative Writ of Mandate

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I. INTRODUCTION AND STATEMENT OF RELIEF SOUGHT

This case arises from the City of Edmonds' refusal to issue a final decision approving Nathan Rimmer's application to build a house on his vacant residential lot unless he first executes a notice to title binding him to plant and publicly dedicate two new trees on his property in order to replace a single, small tree that must be removed to allow for the construction of his home. The City's 2:1 tree replacement condition plainly violates the "essential nexus" and "rough proportionality" requirements of the federal unconstitutional conditions doctrine. This doctrine holds that the government may not condition a land-use permit on a public dedication of private property without compensation unless the government first shows that its demand bears an essential nexus and is roughly proportionate to an identified, adverse impact of the property's use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). The City has also violated its own code by refusing to issue a final decision on a vested permit application that it has determined satisfies all published code criteria besides the unconstitutional tree replacement demand. *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 28, 385 P.2d 372 (1963) (a final decision "must issue as a matter of right" upon an applicant's compliance with the zoning regulations and building code). Mr. Rimmer respectfully requests that this Court grant his motion for summary judgment declaring the condition to be unconstitutional and to issue a writ of mandate directing the City to carry out its ministerial duty to issue a final decision on his vested application, free of the unconstitutional condition.

II. STATEMENT OF ISSUES

1. Whether the Court should enter an order granting summary judgment in favor of Mr. Rimmer where the City's 2:1 Tree Replacement Demand violates the nexus and proportionality standards of *Nollan* and *Dolan*; and

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2. Whether the Court should issue a writ of mandate directing the City to immediately issue a final decision approving Mr. Rimmer's build permit application without the tree/property dedication condition where (1) the application has satisfied all criteria for approval, (2) the City is under a ministerial duty to issue the permit, and (3) the City's demand for a dedication of personal and real property violates *Nollan* and *Dolan* and is therefore invalid and cannot be imposed as a condition to a final decision on the permit application.

III. EVIDENCE RELIED ON

Declaration of Nathan Rimmer and Exhibits attached thereto.

IV. STATEMENT OF FACTS

On March 27, 2022, Mr. Rimmer applied to the City for a permit to build a family home on his residentially zoned lot located at 919 Cedar Street in the City of Edmonds. Rimmer Dec. ¶¶ 2–3. This should have been a simple review and approval process. But it wasn't. Instead, the permit process was hijacked by the City's unconstitutional demand that Mr. Rimmer execute a notice to title permanently dedicating a portion of his lot and two new trees before the City would approve his application, Rimmer Dec. ¶ 9. This unconstitutional demand has resulted in the City wrongfully withholding a final decision on the building permit application for well over a year. *Id*.

A. The City Determined That Mr. Rimmer Satisfied All Code Criteria for a Residential Build Permit Besides the Challenged Tree Condition

The City screened Mr. Rimmer's application for completeness on March 30, 2022. Rimmer Dec. ¶ 4. Thereafter, Mr. Rimmer completed his application by uploading his architectural plans and paying all fees on April 4, 2022. Rimmer Dec. ¶ 5. That date is significant because the City has a ministerial, nondiscretionary duty to issue a final decision on a permit application within 120 days after it is deemed complete. ECDC § 20.02.007 ("The director shall issue a notice of final decision within 120 days of the issuance of the determination of completeness ….") . However,

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even as early as May 10, 2022, the City determined that Mr. Rimmer's application had satisfied all criteria for a final decision with the exception of executing the challenged notice to title. Rimmer Dec. ¶ 9. Thus, based on that date, the City has been under a duty to issue a final decision since September 7, 2022. But instead of satisfying that duty, the City spent nearly a year pressing its unconstitutional demand that Mr. Rimmer first dedicate trees and property to a public use before it would issue a final decision on his application.

B. The City Demands That Mr. Rimmer Dedicate Property and Trees as a Condition of Receiving a Final Decision on His Application

As part of the City's permit review process, Mr. Rimmer was first required, at his own expense, to hire an arborist to identify any trees that are subject to the City's tree retention ordinance. Rimmer Dec. ¶ 6; Ch. 23.10 ECDC. Mr. Rimmer's arborist identified three trees that fall within the City's definition of "protected trees." Rimmer Dec. ¶ 7. Two are western red cedars located entirely within the City's right of way and therefore exempt from the City's tree retention requirements. *Id.* The third is a small, ornamental flowering dogwood located in the middle of the lot, and it must be removed to make any residential use of the property. *Id.*

That dogwood is at the heart of the parties' dispute. The City Code deems the dogwood a "significant" tree simply because its trunk measures 6 inches or greater at breast height. ECDC § 23.10.020(R); ECDC § 23.10.080. And because the combined diameter of the dogwood's two leader branches fell between 10 and 14 inches, the Code's mandatory replacement schedule required Mr. Rimmer to replace the single dogwood with *two* replacement trees. *Id*. In making this predetermined demand, however, the Code did not provide for any consideration of whether the removal of the ornamental dogwood would have any impact on the public before imposing a standardized 2:1 retention mandate on Mr. Rimmer. *Id*. Nor did it make any findings concerning whether the replacement ratio was proportional to any perceived impacts—let alone why the City's

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tree retention goals had to be accomplished through a permanent dedication of private property to the public. *Id.* The City, through Senior Planner Michael Clugston, further demanded that, as a precondition to issuance of a building permit, Mr. Rimmer must execute a notice on his title dedicating two replacement trees and a portion of his residential lot for the installation and perpetual maintenance of those trees (the "Tree Condition" or "Dedication"). Rimmer Dec. ¶ 11.

On May 10, 2022, Senior Planner Clugston sent Mr. Rimmer a letter insisting that Mr. Rimmer comply with the Dedication before any decision will issue on his permit application. Rimmer Dec. ¶ 9. The letter included a City-prepared notice to title identifying Mr. Rimmer as a "grantor" of property and itself as the "grantee" of that interest. *Id*. The notice to title, furthermore, contains no limit to the City's property interest—such as limiting ownership to the lifespan of the replacement trees. Thus, it would effectively bind current and future owners to maintain two replacement trees in perpetuity at a designated location on the Property. Rimmer Dec. at Exhibit (Ex.) D.

C. Mr. Rimmer's Objections Are Ignored; the City Demands That He Execute the Dedication Before It Will Issue a Final Decision on the Application

On September 21, 2022, after spending several months addressing permitting questions that are unrelated to the Dedication, Mr. Rimmer responded to the City's demand by formally objecting to the Dedication as violating the doctrine of unconstitutional conditions:

> [T]he requirement that I plant two trees to replace a single dogwood tree that must be removed in order to make any residential use of my property, and further the requirement that a notice on title be recorded dedicating a portion of my property to perpetually hold and maintain these two trees, constitutes the type of unsupported and disproportionate property demand that violates the unconstitutional conditions doctrine as set out by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Rimmer Dec. at Ex. E. Mr. Rimmer's letter specifically objected that "the permit condition demand was imposed without (1) a nexus study determining whether the existing dogwood tree is providing

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any measurable benefit to the public and (2) without a proportionality determination limiting the replacement demand to only that which is necessary to mitigate for the removal of an identified benefit." *Id*. Finally, Mr. Rimmer's letter cited a Washington Supreme Court decision holding that "nexus and proportionality determinations … must be done before a condition is demanded—not timely doing so violates the U.S. Constitution and requires that the condition be stricken from the permit." *Id*. (citing *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 449 P.3d 269 (2019)).

Thereafter, the parties exchanged a series of letters in which Mr. Rimmer repeatedly asked the City to address his unconstitutional conditions objection, Rimmer Dec. at Exs. F through H. The City, through Senior Planner Clugston, simply ignored Mr. Rimmer's requests. Rimmer Dec. at Exs. I through K. Instead, each response by Senior Planner Clugston simply reasserted the demand that Mr. Rimmer immediately dedicate his property to a public use before the City will issue a decision on his application. *Id*. Critically, in the third such exchange on May 18, 2023, Senior Planner Clugston confirmed that there is only "one outstanding item [that] needs to be submitted before I can approve the permit"—namely, execution of the Dedication. Rimmer Dec. at Ex. J. Then, on June 21, 2023, Senior Planner Clugston further clarified that no decision had been made on the application: "this permit application is still under review—it's not approved, denied, conditionally approved or otherwise." Rimmer Dec. at Ex. K.

In that June 21, 2023 letter, Senior Planner Clugston upped the ante in this dispute by threatening that, "If a recorded copy of [the Dedication] is not submitted before July 27, 2023 … this permit application will expire." *Id*. The letter, however, provided no explanation for the newly imposed expiration date, nor did it explain how the City could "expire" an application that satisfied all criteria for approval. *Id*.

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Frustrated with the City's refusal to address his objections and the imposition of an arbitrary "expiration date," Mr. Rimmer had his legal counsel submit a letter dated July 11, 2023, formally objecting *for a fifth time* to the Dedication and insisting that the City issue a decision on the application. Rimmer Dec. at Ex. M. The letter cautioned Senior Planner Clugston that his actions—including his knowing refusal to respond to Mr. Rimmer's objections—may expose the City to damages under 42 U.S.C. § 1983, among other remedies. *Id*.

Senior Planner Clugston responded by email on July 14, 2023, again ignoring Mr. Rimmer's objections, and insisting that a "decision cannot be made on the permit [application]" until Mr. Rimmer executes the Dedication. Rimmer Dec. at Ex. N. The email again threatened that the application would expire on July 27, 2023, still providing no explanation or support for having chosen that date. *Id*.

D. The City Agrees to Move the "Expiration" Date to Allow This Court to Determine the Lawfulness of the Dedication Demand

Faced with the City's refusal to respond to his objections and a looming "expiration" date on his application, Mr. Rimmer filed this petition seeking writs of mandamus and prohibition, combined with a complaint seeking declaratory relief and damages for a violation of his federal civil rights under 42 U.S.C. § 1983. Thereafter, on July 24, Mr. Rimmer wrote Senior Planner Clugston to advise him of the lawsuit and reasonably requested that he suspend the July 27, 2023, "expiration" date under ECDC § 19.00.025(H)(4)(c) ("The Building Official may extend the life of an application if any of the following conditions exist: … (c) Litigation against the City or applicant is in progress, the outcome of which may affect the validity or the provisions of any permit issued pursuant to such application."). Rimmer Dec. at Ex. O.

Yet again, Senior Planner Clugston ignored the substance of Mr. Rimmer's letter and did not respond to his request to suspend the expiration date. Instead, Senior Planner Clugston wrote

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that he had miscalculated the "expiration" date and reset it to August 5, 2023. Rimmer Dec. at Ex. P. After a phone call between Mr. Rimmer's counsel and the City's attorneys, the City's Building Official agreed to extend the expiration until October 29, 2023, Rimmer Dec. at Ex. Q, and again to February 29, 2024. These extensions should have afforded the City ample time to review Mr. Rimmer's federal constitutional objection and issue a final approval, denial, or conditional approval on his completed permit application, but no decision was forthcoming. Faced with the City's ongoing refusal to issue a final decision on his application, Mr. Rimmer now seeks relief from this Court.

V. ARGUMENT AND AUTHORITY

MOTION FOR SUMMARY JUDGMENT

VIOLATION OF THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS (DECLARATORY JUDGMENT ACT, 42 U.S.C. § 1983)

Mr. Rimmer is entitled to summary judgement on his claims for declaratory judgment and for violation of the federal doctrine of unconstitutional conditions under 42 U.S.C. § 1983. *See* CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Because this case arises from the City's actions that occurred during the permit application review process, all material facts are established by the record of that adjudicative proceeding. Thus, there is nothing preventing this Court from entering judgment as a matter of law.

The federal doctrine of unconstitutional conditions enforces an outer limit on state and local government authority by forbidding the government from conditioning the approval of a permit or license upon the surrender of a right secured by the U.S. Constitution. *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) ("[T]he power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights."). In the land-use permitting

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context, the doctrine holds that (1) the government may require a landowner to dedicate property to a public use *only* when it is shown to be sufficiently necessary to mitigate adverse public impacts of a proposed development, but (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 570 U.S. at 604–06; *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ("[G]overnment may not require a person to give up the constitutional right ... to receive just compensation when property is taken for a public use … in exchange for a discretionary benefit [that] has little or no relationship to the property."). In this way, the nexus and proportionality tests ensure that individual landowners are not singled out during the permitting process to bear the burdens of public policies—like reversing historic impacts to the tree canopy—that should be distributed among the public as a whole. *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). Faithful application of those tests is essential to landowners who are "are especially vulnerable to the type of [impermissible burden shifting] that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 570 U.S. at 605.

As recently summarized by the Washington State Supreme Court, the nexus test requires:

> **First**, the government must show the development will create or exacerbate an identified public problem. **Second**, the government must show the proposed condition will tend to solve or alleviate the public problem.

And the proportionality test requires:

> **Finally**, the government must show that the condition is roughly proportional to the development's anticipated impact. In fulfilling these requirements, the government must, to some degree, quantify its findings, and cannot rely on speculation regarding the impacts or mitigation of them.

Church of Divine Earth, 194 Wn.2d at 138 (citations fixed, emphasis added).

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Critically, this doctrine invokes heightened scrutiny by placing the burden on the government to satisfy both tests. *Dolan*, 512 U.S. at 391; *see also id*. n.8 (explaining that, under the doctrine of unconstitutional conditions, the government is not entitled to deference). And when addressing the nexus and proportionality tests, the U.S. Supreme Court has emphasized that the government's reliance on studies showing the general beneficial effect of a dedication is *not enough* to satisfy the doctrine of unconstitutional conditions.[1] *Id*. at 389 ("generalized statements as to the necessary connection between the required dedication and the proposed development [are] too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose"). Instead, the government must quantify its demand based on sufficiently site-specific findings. *Id*. at 391. Because the doctrine is violated the moment an unconstitutional condition is placed on a land-use application, the government must include its nexus and proportionality analysis in the record of its decision. *Church of Divine Earth*, 194 Wn.2d at 138 (in evaluating nexus and proportionality, the court must look only to the justifications memorialized in the record; it may not consider post-hoc arguments). A failure by the government to meet this burden will violate the doctrine of unconstitutional conditions and render the government's demand invalid and unenforceable. *Dolan*, 512 U.S. at 391.

At issue here is whether the City's requirement that Mr. Rimmer execute a notice to title binding him to replace a single ornamental dogwood tree with two replacement trees violates *Nollan* and *Dolan*. Rimmer Dec. at Ex. D. It does.

A. The City's Tree Dedication Condition Demands an Interest in Property

The City's Tree Condition is subject to the doctrine of unconstitutional conditions because it demands that Mr. Rimmer dedicate personal and real property to a public environmental use.

[1] *Id*. at 392, 395 (acknowledging that the city had considered valid studies regarding the traffic and stormwater impacts).

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Trees on one's land are personal property and are protected by the Fifth Amendment to the U.S. Constitution. *See Charter Township of Canton v. 44650, Inc.*, __ N.W.2d __, No. 354309, 2023 WL 2938991, at *14 (Mich. Ct. App. Apr. 13, 2023) (holding a tree condition subject to *Nollan* and *Dolan*); *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 205–08 (6th Cir. 2021) (same); *Mira Mar Development v. City of Coppell*, 421 S.W.3d 74, 95–96 (Tex. Ct. App. 2013) (same). So, too, is the land on which the dedicated trees are to be planted and maintained. *Id*. Washington property law further holds that a requirement to put one's land to a public environmental use is also a valuable property interest. RCW 64.04.130 (A "development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect … or conserve for open space purposes … constitutes and is classified as real property."). Thus, the City's Tree Dedication condition plainly "operate[s] upon or alter[s] an identified property interest." *Koontz*, 570 U.S. at 613.

The fact that a notice to title can effect a dedication of property is also beyond reasonable dispute. Washington law recognizes that such a binding public document may result in public dedications of private property.[2] RCW 58.17.020(3) (defining a dedication as "the deliberate appropriation of land by an owner for any general public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted"); *see also Richardson v. Cox*, 108 Wn. App. 881, 884, 890–91, 26 P.3d 970 (2001) (dedication achieved through a deed restriction); *Nollan*, 483 U.S. at 833

[2] Indeed, the common law of property places no formalities on dedications, requiring only that the owner assent to put land to a public use. *City of Cincinnati v. White's Lessee*, 31 U.S. 431, 440, 8 L. Ed. 452 (1832); *see also Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 129, 336 P.3d 632 (2014) (same); *Town of Moorcraft v. Lang*, 779 P.2d 1180, 1183 (Wyo. 1989) (while a dedication does not transfer title, it does reduce on owner's rights by creating enforceable public rights in the dedicated land).

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n.2; *id*. at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction); *McConiga v. Riches*, 40 Wn. App. 532, 537, 700 P.2d 331 (1985) (the government's issuance of a conditioned permit creates a dedication); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072, 2067, 210 L. Ed. 2d 369 (2021) (holding that the classification of an interest in property need not match precisely the statutory definition of an easement for the Takings Clause to apply: "Under the Constitution, property rights 'cannot be so easily manipulated.'"). And lest there be any doubt that the City's Tree Condition seeks an interest in property, the "Notice to Title"—a document drafted by the City—designates Mr. Rimmer as the "grantor" of a property interest and the City as the "grantee." Rimmer Dec. at Ex. D.

B. The City Cannot Meet Its Burden of Showing Nexus and Proportionality

The City's record shows that it imposed the Tree Dedication condition without first engaging in the required nexus and proportionality analysis. And it did so despite Mr. Rimmer's numerous objections asking the City to either remove the condition from his application or to justify the 2:1 tree replacement condition under *Nollan* and *Dolan*. Rimmer Dec. at Exs. E through H. Indeed, rather than justifying the condition, Senior Planner Clugston simply stated that the Tree Dedication is mandated by the City's tree retention ordinance, ECDC § 23.10.085. Rimmer Dec. at Exs. I, J, K. But *Nollan* and *Dolan* show that a legislative determination of need alone cannot satisfy the government's constitutional burden. Instead, the doctrine requires that the government take the additional step of making a sufficiently individualized determination establishing nexus and proportionality before it can condition a permit on the dedication of property. *See Citizens' All. for Prop. Rts. v. Sims*, 145 Wn. App. 649, 668, 187 P.3d 786 (2008) (A legislatively mandated exaction will violate the proportionality test where it "imposes a uniform requirement … unrelated to any evaluation of the demonstrated impact of proposed development."). The City's failure to do so here renders its Tree Dedication condition unconstitutional and invalid. *Id.*

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In *Nollan*, the California Coastal Commission, acting pursuant to state legislation,[3] required Patrick Nollan to dedicate an easement over a strip of his private beachfront property as a condition to obtaining a permit to rebuild his home. 483 U.S. at 827–28. The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically ... from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828–29 (quoting commission staff report). The Nollans refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition was a taking because it bore no logical connection to the impact of their proposed development.

The California Court of Appeal upheld the condition. But the U.S. Supreme Court reversed because the easement condition lacked an "essential nexus" to the alleged public impacts that would result from the Nollans' project. *Id.* at 837. Because rebuilding the Nollans' home could have no impact on public-beach access, the Commission could not justify a permit condition requiring them to dedicate an uncompensated easement over their property. *Id.* at 838–39. Without a sufficient nexus between the permit condition and the project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

In reaching this conclusion, the Court made three points in response to Justice Brennan's dissenting opinion that are relevant to this petition.

[3] *Nollan*, 483 U.S. at 828–30 (citing California Coastal Act and California Public Resources Code); *see also id*. at 858 (Brennan, J., dissenting) (pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract").

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- First, the Court refused to consider post-hoc, alternative grounds that were not addressed by the Commission's decision. *Id.* at 832–33.
- Second, the Court explained that a showing of rationality alone cannot satisfy the nexus requirement. *Id*. at 840–41.
- And third, a showing that the dedication serves the public interest does not satisfy the nexus test; it indicates that the Commission should pay for the property. *Id*. at 841–42.

Dolan clarified that the required "fit" between a permit condition and the alleged public impact of a proposed land use requires "some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." 512 U.S. at 391 (footnote omitted, emphasis added). In that case, the City of Tigard's development code[4] imposed two conditions on Florence Dolan's permit to expand her plumbing and electrical supply store: to dedicate approximately 10 percent of her land as a stream buffer and for a bicycle path. *Id*. at 377, 380. Dolan refused to comply with the conditions and sued the city in state court on a federal Takings Clause claim. The Court held that although the city established a nexus between both conditions and Dolan's proposed expansion, the conditions nevertheless effected an unconstitutional taking because they lacked a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. Looking only to the justifications memorialized in the city's record, *Dolan* held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's change in land use. Thus, the permit conditions unconstitutionally took Dolan's property without just compensation. *Id.* at 379–80, 391.

Critically, in enacting the city code provisions requiring the dedications, the City of Tigard considered and relied on valid studies showing the beneficial effects of setting aside land to

[4] *Dolan*, 512 U.S. at 379–80.

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mitigate traffic and stormwater impacts. *Dolan* held that this consideration and reliance is *not enough* to satisfy the doctrine of unconstitutional conditions. *Id*. at 392, 395. Even the most laudable goals will not allow a government to evade the constitutional requirements of nexus and proportionality. *Id*. at 396. The rough proportionality test requires the government to go further and engage in an individualized, site-specific determination of impacts requiring mitigation because "generalized statements as to the necessary connection between the required dedication and the proposed development [are] too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose." *Id*. at 389. The bicycle path condition failed the test because the city made no showing that a bicycle path could offset any of the increased traffic resulting from a plumbing store expansion. *Id*. at 395–96. The stream buffer condition similarly lacked rough proportionality because lesser regulatory restrictions (such as setbacks and open space requirements) could sufficiently mitigate the project's increased stormwater flow. *Id*. at 393–95 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

Edmonds' tree retention ordinance suffers from the same failure by setting a predetermined schedule of mitigation ratios without any individualized determination establishing that Mr. Rimmer's removal of a single ornamental dogwood from the middle of his residential lot will have any impact on the public, let alone any determination that the ordinance's standardized 2:1 replacement ratio is proportional to those impacts. ECDC § 23.10.080(A). Nor, as in *Dolan*, is there any evidence showing why a dedication of property is necessary to advance the City's tree retention goals. Instead, the ordinance sweepingly mandates that an applicant "shall, as a condition of permit issuance, record a notice on title" dedicating trees and land, ECDC § 23.10.085, as

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required by the City's standardized schedule of replacement ratios. ECDC § 23.10.080(A). That alone violates *Nollan* and *Dolan*. But the City goes further.

The City's tree plainly ordinance violates the proportionality test by demanding that the Tree Dedication to go beyond the impact mitigation standard policed by *Nollan* and *Dolan*. Indeed, per its plain terms, the City's tree retention ordinance demands that property owners like Mr. Rimmer provide public benefits "in an amount sufficient … to exceed the loss":

> The purpose of this chapter is to establish a process and standards to provide for the evaluation, protection, enhancement, preservation, replacement, and proper maintenance of significant trees. This includes the following:
> …
> Promote net ecological gain, a standard for a development project, policy, plan, or activity in which the impacts on the ecological integrity caused by the development are outweighed by measures taken consistent with the new mitigation hierarchy to avoid and minimize the impacts, undertake site restoration, and compensate for any remaining impacts in an amount sufficient for the gain to exceed the loss.

ECDC § 23.10.000(L) ("Intent and Purpose") (emphasis added). Thus, the record is devoid of any "individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (footnote omitted, emphasis added). Indeed, the code readily admits that the replacement ratio is disproportionate. The City's purposefully disproportionate 2:1 tree replacement condition clearly violates the doctrine of unconstitutional conditions.

C. Similar Tree Dedication Conditions Have Been Held to Violate *Nollan* and *Dolan*

The Sixth Circuit recently invalidated a similar tree replacement condition as violating the nexus and proportionality tests in *F.P. Dev., LLC*, 16 F.4th at 205–08. At issue in that case was a tree-retention ordinance that generally prohibits landowners from removing certain trees without a permit and, where a tree must be removed to accommodate development, requires the owner to mitigate the removal by either replacing the tree or paying into a public tree fund based on a predetermined mitigation schedule. *Id.* at 201–02. Like Edmonds' tree ordinance, the Canton

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ordinance defined a "regulated tree" as "any tree with a [diameter breast height] of six inches or greater" and adopted a predetermined schedule of replacement ratios requiring owners to replant one tree for every non-landmark regulated tree removed and three trees for every landmark tree. *Id*. at 201. Thus, when F.P. Development cleared 159 trees—14 landmark trees and 145 non-landmark trees—without a removal permit, the township issued a notice of violation and demanded that, under the preset mitigation schedule set out by the tree ordinance, F.P. either plant 187 new replacement trees or pay $47,898 into a public tree fund. *Id*. at 202.

F.P. refused to pay or plant new trees and instead filed a lawsuit against the township claiming that its tree replacement condition violated the proportionality test because the tree replacement condition was imposed pursuant to a predetermined formula without a sufficiently individualized proportionality determination. The Sixth Circuit agreed, concluding at the outset that simply counting the number of trees removed and applying the ordinance's mitigation ratio schedule was not enough to carry the township's burden to show that it had made the required individualized determination under *Dolan*. *Id*. at 206 ("*Dolan* requires more."). To meet the proportionality requirement, the court found that the township must show that its mitigation demand related to a sufficiently individualized determination that "F.P.'s tree removal effects a certain level of environmental degradation on the surrounding area." *Id*. at 207. As part of that analysis, the township was also required to consider any offsets or public benefits resulting from the proposed development. *Id*. The township's failure to engage in such an individualized determination of impacts violated *Dolan* and rendered the tree condition unconstitutional. *Id*. at 208.

A Michigan appellate court reached the same conclusion in the companion case, *Charter Township of Canton*, 2023 WL 2938991, at *14. At issue there was the township's application of

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the same tree ordinance against F.P. Development's neighbor, 44650, Inc., who had removed 100 landmark trees and 1,385 regulated trees without a tree removal permit. *Id*. at *3. Applying the same predetermined replacement schedule at issue in *F.P. Development*, the township demanded that the owner either plant 1,685 replacement trees or pay $446,625 into the township's tree fund. *Id*. Like the Sixth Circuit, the Michigan appellate court concluded that the tree replacement condition was a dedication subject to *Nollan* and *Dolan*. *Id*. at *12–13. And like the Sixth Circuit, the state court also ruled that the township's application of predetermined mitigation ratios violated the proportionality test:

> The Tree Ordinance requires preset mitigation. [The owner] must replace one tree for each nonlandmark tree removed and three trees for each landmark tree removed, either by replanting the trees at its own cost or by paying into the tree fund for the replacement of the trees at the same ratio. However, there is no evidence in the record, nor any argument from [the township] on appeal, that this required mitigation bears any relationship to the impact of defendant's tree removal. Indeed, completely lacking from the record is any individualized assessment of the impact of defendant's clear-cutting of trees from its 16 acres. [The township], for example, provided no evidence that [owner's] tree removal caused any environmental degradation generally, and admitted it had no evidence that the removal caused any environmental harm to neighboring parcels[.] In sum, because [the township] has not shown that the permitting conditions (the mitigation measures) are roughly proportional to the impact of [the owner's] development, [the township's] Tree Ordinance as applied is an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*.

Id. at *14.

Similarly, in *Mira Mar Development*, a Texas appellate court concluded that the government's lack of individualized evidence supporting a tree removal mitigation fee failed the rough proportionality test. 421 S.W.3d at 95–96. There, a property owner applied to the City of Coppell for a development permit. *Id.* at 95. Like Canton, the city conditioned its granting of the permit on the owner's agreeing to pay thousands of dollars in "tree mitigation fees" for trees the owner planned to remove from its property. *Id.* The Texas court first determined that the fees were

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exactions subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Id.* Then, it noted the government's lack of evidence to support a finding of rough proportionality: the city did "not show that the removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance." *Id.* at 96. Thus, like the Sixth Circuit and Michigan court, the Texas court held that, based on the record before it, the ordinance could not meet the evidentiary bar set for rough proportionality in *Dolan*. *Id*.

Edmonds' tree replacement condition fails for the same reason. The City's tree ordinance demands that owners dedicate property under a predetermined formula, without any individualized determination of project impacts, requiring the same conditions for each tree removed no matter the site-specific circumstances. The City's 2:1 tree condition is clearly unconstitutional and cannot stand in the way of the City's duty to issue a final decision on Mr. Rimmer's build permit application.

APPLICATION FOR WRIT OF MANDATE

Mr. Rimmer is also entitled to a writ of mandate directing the City to carry out its ministerial duty to issue a final decision on his permit application, free from the City's unconstitutional demand that he dedicate property to a public use. RCW 7.16.160 (A writ of mandamus may be issued by a court "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station."); *see also Nollan*, 483 U.S. at 828 ("the Nollans filed a petition for writ of administrative mandamus asking the [state court] to invalidate the access condition"). Mandamus requires the satisfaction of three elements: (1) the party subject to the writ is under a clear duty to act; (2) the applicant has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the applicant is beneficially interested. RCW 7.16.160, .170;

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Hood Canal Sand & Gravel, LLC v. Goldmark, 195 Wn. App. 284, 304, 381 P.3d 95 (2016). Mr. Rimmer's application clearly satisfies each of these elements.

Mr. Rimmer has a clear right to a final decision approving his build permit application. As stated above, the City screened Mr. Rimmer's application for completeness on March 30, 2022, Rimmer Dec. ¶ 4; thereafter, Mr. Rimmer completed his application by uploading his architectural plans and paying all fees on April 4, 2022. Rimmer Dec. ¶ 5. On February 27, 2023, Senior Planner Clugston confirmed that Mr. Rimmer's application had satisfied all published code criteria, excepting the Tree Dedication, Rimmer Dec. at Ex. I, and has since confirmed that Mr. Rimmer is otherwise entitled to an *approval* decision. Rimmer Dec. at Exs. J, N, P. The City is therefore under a duty to issue a final decision approving or conditionally approving the application. *State ex rel. Craven*, 63 Wn.2d at 28 (a final decision "must issue as a matter of right" upon an applicant's compliance with the zoning regulations and building code); *see also State ex rel. Klappsa v. City of Enumclaw*, 73 Wn.2d 451, 453, 439 P.2d 246 (1968) (directing trial court to issue a writ of mandate to compel a city to issue a final decision on a build permit application, even where the government retained discretion to place conditions on an approval); *State ex rel. Woods v. Mackintosh*, 99 Wash. 553, 554, 169 P. 990 (1918) (mandamus is appropriate to compel an officer to act "when it holds a cause in abeyance and refuses to decide either one way or the other") (quoting *In re Clerf*, 55 Wash. 465, 468, 104 P. 622 (1909)). Indeed, it is black letter law that "issuance of a building permit is a ministerial act for which mandamus will lie where compliance with the zoning regulations is shown." *Craven*, 63 Wn.2d at 28; *see also Hood Canal Sand & Gravel*, 195 Wn. App. at 303–04 (same); *Parkridge v. Seattle*, 89 Wn.2d 454, 465, 573 P.2d 359 (1978) (same). And the time for issuing a final decision is long overdue. Based on the above dates, the City's deadline for issuing a final decision was June 27, 2023. ECDC

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§ 20.02.007(A) ("The director shall issue a notice of final decision within 120 days of the issuance of the determination of completeness …."); *Kanekoa v. Wash. State Dep't of Soc. & Health Svcs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981) (A statute's use of the term "shall" is "[p]resumptively … imperative and operates to create a duty rather than to confer discretion.").

Mandamus is necessary to avoid an irreparable constitutional injury that will occur if the City is allowed to expire his application on February 29, 2024, without issuing a final decision approving or denying his application. Mr. Rimmer's development rights are vested. ECDC § 19.00.025(H); RCW 19.27.095(1); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). He therefore has a right to have his application decided under the laws in effect at the time of filing. His vested development rights are furthermore deemed a valuable and protectable property interest. *Id*. Allowing the City to expire Mr. Rimmer's application would give effect to the City's challenged Dedication, depriving Mr. Rimmer of his right to receive a decision on his application free of unconstitutional condition. *Koontz*, 570 U.S. at 606 (the government may not "evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval").

If the City is allowed to expire the application, Mr. Rimmer will also incur irreparable financial losses. Like most project applicants, Mr. Rimmer invested a significant amount of time and money into developing a complete and vested application that otherwise satisfies all published criteria for approval, and has incurred substantial costs supporting the application with architectural plans, engineering plans, etc. Rimmer Dec. ¶ 30. Portions of that investment (the precise amount of which to be proven at trial, if necessary) will be lost if the application is expired. Indeed, the Code's provision for "renewing" an expired application confirms that, even if he

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reapplies for a permit to build his home, Mr. Rimmer will have to "submit a new application, revised plans based on any applicable code or ordinance change, and pay new plan review fees." ECDC § 19.00.025(H)(3).

VI. CONCLUSION

For the reasons set forth above, the Court should issue summary judgment declaring that the City's Tree Dedication condition violates the doctrine of unconstitutional conditions and issue a writ of mandate directing the City to carry out its ministerial duty to issue a final decision on Mr. Rimmer's vested application, free of the unconstitutional condition.

RESPECTFULLY SUBMITTED this 29th day of December, 2023.

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CERTIFICATE OF SERVICE

I certify that on December 29, 2023, I caused the foregoing to be filed with the Clerk of this Court via the Court's eFile Washington application. The eFile Washington system will send notice of this filing to Counsel of Record for the DefendantCity of Edmonds:

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