Case No: 87644-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

City of Edmonds, a municipal corporation of the State of Washington,

Appellant,

v.

Nathan Rimmer,

Respondent.

On appeal of an order of the Snohomish County Superior Court, Case No. 23-2-05426-0

BRIEF OF RESPONDENT

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INTRODUCTION

This case presents a textbook example of an unconstitutional permit condition. The City of Edmonds refused to issue Nathan Rimmer's residential building permit unless he first dedicated a portion of his lot for the installation and perpetual maintenance of two new native trees. The City claimed that the condition sought mitigation for a small ornamental dogwood that would have to be removed to allow for the construction of his proposed home. But when Mr. Rimmer asked for an explanation why he was required to replace one tree with two, the City refused to answer. Instead, Edmonds increased its pressure on Mr. Rimmer by threatening to "expire" the application if he didn't immediately comply with its demand—a tactic that would strip him of both his substantial investment in the application and his ability to administratively appeal the permit condition.

This is the precise type of coercion that the doctrine of unconstitutional conditions is designed to prevent. *Koontz v. St.*

Johns River Water Mgmt. Dist., 570 U.S. 595, 604–06, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). In the permitting context, the doctrine forbids government from conditioning issuance of a permit on a requirement that the applicant dedicate private property to a public use, unless the government can show that the condition has an "essential nexus" and is "roughly proportionate" to the project's public impacts. *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). To satisfy these tests, the government must "make some sort of 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. In this way, the doctrine prevents the government from using its permitting power "to pressure an owner into . . . giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605.

Edmonds readily admits that it did not make the required determination before imposing the tree condition. CP 68. Nor could it have made such a showing where the arborist reported no impacts resulting from the dogwood's removal and where the City code requires that owners provide replacement trees "in an amount sufficient for the gain to exceed the loss." *See* CP 159 (Edmonds Community Development Code (ECDC) § 23.10.000(L)).

Unable to justify its demand, the City asks this Court to either excuse it from its burden under *Nollan-Dolan* or remand the matter so that its permitting officials can address the lack of evidence supporting the demand. But there is no basis for either request. Per the terms of the permit condition, the City will control the replacement trees as clearly as if it held full title and ownership of them. There is no need, moreover, for Mr. Rimmer to formally convey the demanded property before the protections of the Takings Clause will apply. Nor is there any reason to remand for further deliberations where the City issued a final

unconditioned permit over a year ago; the property has been developed, and the permit file is closed.

For these reasons, Mr. Rimmer respectfully asks this Court to affirm the trial court's judgment. And because the City has stipulated that an affirmance will establish its liability for depriving Mr. Rimmer of his civil rights under 42 U.S.C. § 1983 (CP 18), this Court should award Mr. Rimmer attorneys' fees on appeal pursuant to 42 U.S.C. § 1988.

RESTATEMENT OF ISSUES

1. Whether the trial court correctly ruled that the tree condition was an exaction subject to *Nollan* and *Dolan*.

2. Whether the trial court correctly concluded that the City's two-for-one replacement tree condition violated *Nollan* and *Dolan* where the City failed to establish nexus and proportionality before imposing the condition on Mr. Rimmer's building permit.

3. Whether Edmonds' appeal from the trial court's ruling granting writs of mandamus and prohibition should be dismissed

where the City stipulated that the claims were moot because it issued the building permit without the offending condition and the permit has since been closed.

CORRECTION TO CITY'S STATEMENT OF FACTS AND OMISSIONS

Mr. Rimmer presents the following statement of facts to address Edmonds' incomplete and misleading rendition of facts.

A. Background

On March 27, 2022, Mr. Rimmer applied to the City for a permit to build a family home on a vacant lot located at 919 Cedar Street in the City of Edmonds. CP 151. This should have been a simple process. After all, the lot was zoned for residential use and the City's senior planner determined that Mr. Rimmer's application had satisfied all building code criteria for approval by February 27, 2023. CP 208–209.

But there was a problem.

The former owners of Mr. Rimmer's property had planted a small, non-native flowering dogwood tree in what had once

been a large side yard.[1] CP 179. But after a 2010 boundary line adjustment that created the current configuration of the subject lot (CP 196), the dogwood was now located in the middle of it. CP 180, 182. Thus, the tree would have to be removed to residentially develop the property. *Id*.

[1] CP178, 187 (arborist report identifying the tree as 13-foot-tall flowering dogwood (sp. *cornus florida*)). This non-native species of dogwood is typically used as a garden ornament. Edward F. Gilman & Dennis G. Watson, Cornus florida, Flowering Dogwood, p.3 (U.S. Dep't of Agriculture Fact Sheet ST-185, Nov. 1993) (available at https://hort.ifas.ufl.edu/database/documents/pdf/tree_fact_sheets/corfloa.pdf).

CP 176 (the circle shows the flowering dogwood left of the driveway).

B. The Replacement Tree Condition

Ordinarily, the dogwood wouldn't present a big hurdle because small ornamental trees are known to provide far fewer ecological benefits than native species and are typically the lowest priority for retention regulations.[2] But in 2021, Edmonds adopted a tree ordinance that departed from the ordinary purpose of "maintaining the canopy cover" (an impact mitigation standard) to instead adopt a "net ecological gain" standard on private development.[3] Indeed, the City didn't mince its words in that regard, stating that the "purpose" of the ordinance is to ensure that "the impacts on the ecological integrity caused by the

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[2] King County Dep't of Natural Resources, *Guide to Developing Effective Urban Tree Regulations on Private Property*, p. 30 (2024) ("Although . . . small ornamental trees . . . do provide some valuable canopy cover, they do not offer the same level of year-round ecosystem service benefits that conifers provide in Western Washington.") (available at https://your.kingcounty.gov/dnrp/library/2024/kcr3648/kcr3648.pdf).

[3] *Id.* p. 17.

development are *outweighed* by measures taken . . . to avoid and minimize the impacts . . . and compensate for any remaining impacts *in an amount sufficient for the gain to exceed the loss*." CP 159 (ECDC § 23.10.000(L) ("Intent and Purpose") (emphasis added)).

As is pertinent here, Edmonds' tree ordinance deemed *any* tree whose trunk measured more than six inches in diameter at breast height a "significant tree" subject to the code's mandatory preservation or replacement requirements—a determination that is made without regard to the tree's species, its location, or other factors that are ordinarily considered in making such a determination.[4] CP 161 (ECDC § 23.10.020(R)); CP 170 (ECDC § 23.10.080(A)).

[4] King County DNR, *supra* n.2, p. 30 (To ensure that the replacement requirement meets a mitigation standard, the government should consider "several important factors," including "including size, species, and location." Each of these factors could significantly influence the impacts of removal.).

To determine whether Edmonds' tree ordinance applies to a development proposal, the code directs permit applicants to submit an arborist report identifying any "significant" trees on the property. CP 165 (ECDC § 23.10.060(B)). And if the proposal necessitates the removal of an identified tree, the arborist must disclose any adverse public impacts of its removal in his report. *Id*. Regardless of that determination, the code mandates that the owner plant native "replacement trees" in an amount predetermined by the City's tree replacement schedule. CP 170 (ECDC § 23.10.080(A)). Like the code's determination of significance, the replacement schedule is imposed automatically and without any opportunity for variance. *Id*.

The code further directs the arborist to prepare a "tree retention and protection plan" for each protected tree (CP 164 (ECDC § 23.10.060(B)(ii)), the terms of which will be incorporated in a "notice on title *against* the property."[5] CP 171

[5] Critically, throughout this case, Edmonds has claimed that the mandated arborist report should be construed to satisfy the City's

(ECDC § 23.10.085 (emphasis added)). The protection plan must include a site plan designating the area of the lot where any replacement trees will be located and perpetually maintained pursuant to the City's requirements (the "protection area"). CP 164 (ECDC § 23.10.060(B)); *see also* CP 80 (explaining that the arborist, not the owner, determines where the trees will be planted). Thereafter, the owner may select the species of replacement trees from the City's list of approved native trees.[6]

Mr. Rimmer complied with the procedural aspect of this requirement by hiring an arborist and submitting a report that identified three regulated trees: one small flowering dogwood and two large red cedars. CP 178. Although the cedars were located in Edmonds' right-of-way along the property's frontage (CP 187), those offsite trees were the primary focus of the arborist's report because they were in "fair to good" condition

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obligation to prepare a site-specific analysis of trees and related development impacts. CP 93 n.3; Opening Br. at 39.

[6] https://www.edmondswa.gov/services/sustainability/trees

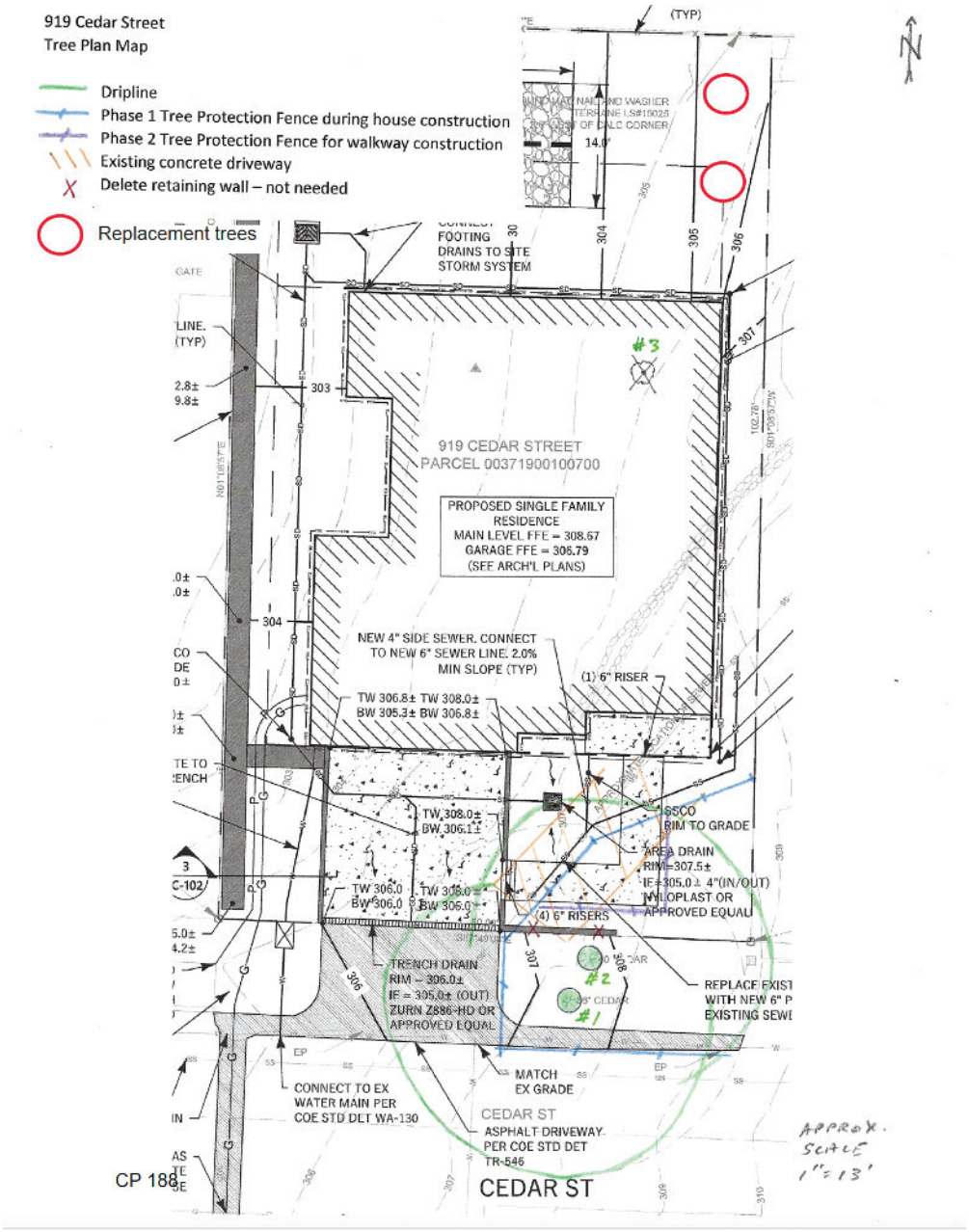
and—while Mr. Rimmer's proposed home wouldn't impact the cedars—his development could be conditioned in a manner that would improve their health. CP 178, 180–181. Thus, the arborist prepared a tree protection plan that directed Mr. Rimmer to remove an existing driveway, upgrade the existing sewer line, and install a tree protection barrier adjacent to the sewer trench. CP 180. He was also required to keep all large plantings and other improvements outside of the cedars' protection area, which is defined as the area under the trees' canopy. CP 181, 188 (site plan showing the size of the protection area).

Mr. Rimmer voluntarily altered his development plans to comply with these conditions and, per the City's insistence, included the terms of the cedar protection plan on the project's main civil plan. CP 190–191.

But the City wanted more.

Even though the arborist did not identify any impacts attributable to the removal of the flowering dogwood (CP 182), the City's tree replacement schedule required Mr. Rimmer to

replace it with *two* native trees. CP 170 (ECDC § 23.10.080(A)). The arborist's report designated the northeast corner of Mr. Rimmer's lot as the location where the replacement trees would be planted, establishing a protection area large enough to allow the trees to "mature without conflicting with surrounding improvements." CP 182, 188.



CP 188 (the proposed location for the replacement trees is indicated by the red circles).

C. Edmonds Demands That Mr. Rimmer Record a Restrictive Covenant Incorporating the Tree Protection Condition

Edmonds faced yet another problem with its desire to permanently protect the replacement trees. At the time Mr. Rimmer applied for a building permit, the City did not regulate tree removal on properties that are not subject to a development application. CP 139. That meant, if Mr. Rimmer sold the property, the future owner could lawfully remove the replacement trees. *Id*. So, the City had to devise a way to bind future owners to the terms of Mr. Rimmer's permit condition. *Id*.

To bind future owners to a tree protection plan, Edmonds adopted a provision requiring applicants to record a "notice on title *against* the property" that incorporated the tree protection plan as a condition precedent to the issuance of a permit.[7] CP 171 (ECDC § 23.10.085 (stating that the protection plan may be made

[7] In a King County survey of local tree ordinances, it found only three cities that required owners to record a covenant as a condition of permit approval. King County DNR, *supra* n.2, p. 35.

"permanent[]" by recording a "covenant restriction" to title)). According to the City, recording the notice is necessary for the trees to "gain protected status that endures after the development is completed"—*i.e.*, the notice is necessary to bind future owners. CP 139.

Indeed, the City's senior planner repeatedly characterized its mandatory "note to title" as a "covenant" when demanding that Mr. Rimmer record it with the county auditor. CP 191, 209, 215, 221. And as if that was not clear enough, the City attorney explained below that the note was intended to record the replacement tree condition on Mr. Rimmer's title. CP 35 (The note to title "provides notice that a condition exists in the City's permit file."); *see also* RP 15 ("The notice that is recorded provides notice of the condition."). And the note itself designated Mr. Rimmer as "the Grantor as required by Grantee, City of Edmonds," and further provided that the tree condition will remain on the property's title "until released by the City of Edmonds." CP 194 (cleaned up).

D. Mr. Rimmer Objected to the Condition, and the City Chose Not to Address Nexus and Proportionality

Mr. Rimmer was confused why the City demanded two new native trees when he sought only to remove a single small ornamental tree—a removal that was deemed necessary and without public impact by the arborist. He was also confused why he had to record the replacement tree condition as a notice against title. So, without an avenue for variance, Mr. Rimmer sent a letter to the City's senior planner asking him to justify and/or reconsider the two-for-one replacement condition. Specifically, Mr. Rimmer, objected that

> [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).

CP 198.

Edmonds ignored Mr. Rimmer's objection and refused to perform a nexus and proportionality analysis "because the City staff does not deem that analysis to be necessary here." CP 68. Instead, the City simply repeated its demand that he immediately record the "covenant" before the City would issue a final decision on his application. CP 208–209. Thereafter, the parties exchanged a series of letters in which Mr. Rimmer repeatedly asked the City to address his objection. CP 200, 203, 205–206. The City, however, ignored each of his requests. CP 215, 221. Critically, in the third such exchange on May 18, 2023, the City's senior planner confirmed that there is only "one outstanding item [that] needs to be submitted before I can approve the permit"—namely, recording the covenant. CP 215. Then, on June 21, 2023, the senior planner backtracked, insisting that the City would not tell Mr. Rimmer whether it would issue the applied-for permit if he recorded the covenant, stating that no decision had been made

on the application: "it's not approved, denied, conditionally approved or otherwise." CP 221.

In that June 21, 2023, letter, the senior planner turned up the pressure on Mr. Rimmer by threatening that, "If a recorded copy of [the covenant] is not submitted before July 27, 2023 . . . this permit application will expire"—a decision that would strip Mr. Rimmer of all rights in the vested application, his significant investment of time and money, and most importantly his right to appeal the permit condition to a hearing examiner (and the courts, if necessary). *Id*.

Frustrated with the City's refusal to address his objection and its imposition of an arbitrary "expiration date," Mr. Rimmer had his legal counsel submit a letter dated July 11, 2023, formally objecting to the tree condition *for a fifth time* and insisting that the City issue an appealable decision on the application. CP 229–230. The letter cautioned the City that its actions may expose Edmonds to damages under 42 U.S.C. § 1983, among other remedies. *Id*.

The City's senior planner responded 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 records the covenant on his title. CP 232. The email again threatened that the application would expire on July 27, 2023. *Id*.

E. Mr. Rimmer Files a Combined Petition for Writs of Mandate and Prohibition and Complaint for Damages

Finding himself at an impasse with regard to the condition and faced with a coercive "expiration date," Mr. Rimmer filed a combined petition for writs of mandate and prohibition and complaint with the Snohomish County Superior Court on July 26, 2023. CP 269–285. The writ petitions sought to prohibit the City from carrying out its threat to "expire" the application and to compel issuance of the applied-for permit without the offending condition. CP 278–281. The complaint sought declaratory relief under the Uniform Declaratory Judgment Act,

Ch. 7.24 RCW, and damages and attorneys' fees under 42 U.S.C. §§ 1983 and 1988. CP 282–284.

F. The First Round of Summary Judgment Motions

In late 2023, Mr. Rimmer noted a motion for partial summary judgment on his mandamus, prohibition, and declaratory relief claims. CP 243–267. In response, the City filed a cross-motion seeking dismissal of Mr. Rimmer's declaratory judgment and Section 1983 claims. CP 136–149.

The hearing on the parties' cross-motions for summary judgment took place before Judge Appel on January 31, 2024. After arguments, the Court issued an oral ruling (1) declaring the two-for-one replacement condition was an unconstitutional exaction, (2) granting the applications for writs of mandamus and directing the City to issue the permit, and (3) and denying the City's cross-motion for summary judgment on Mr. Rimmer's declaratory judgment and Section 1983 claims. RP 52–60. Because Mr. Rimmer did not move for summary judgment on his

Section 1983 claim, the trial court ruled that the civil rights claim would proceed to trial. RP 60.

After some delay, the trial court signed its written order on December 9, 2024. CP 10–16. Critically, the order concluded that the tree condition directed Mr. Rimmer to "dedicate a portion of his lot to the installation and perpetual maintenance of two City-mandated replacement trees," and is therefore "an exaction subject to *Nollan* [. . .] and *Dolan*[.]" CP 13. The court thereafter determined that the City "has not carried its burden under *Nollan-Dolan* of demonstrating that the exaction satisfies the 'essential nexus' and 'rough proportionality' tests." *Id.* "With respect to nexus, the City cannot show that the removal of a single tree from Mr. Rimmer's property will cause any public impact requiring mitigation." *Id.* "With respect to proportionality, the City failed to establish that its demand that Mr. Rimmer plant and perpetually maintain two new replacement trees is roughly proportional to any adverse public impacts of his proposed residential development, including his

planned removal of a single dogwood tree." *Id*. Accordingly, the trial court concluded that the tree condition violated the doctrine of unconstitutional conditions, and that Mr. Rimmer suffered a federal constitutional injury "at the moment [the City] conditioned issuance of Mr. Rimmer's building permit upon an unlawful exaction." CP 14.

The trial court issued declaratory judgment that "the challenged permit condition is unconstitutional under the Doctrine of Unconstitutional Conditions, as predicated on the Fifth and Fourteenth Amendments to the U.S. Constitution and is declared invalid." CP 15 (enjoining the City from enforcing the condition on Mr. Rimmer's building permit).

G. The City Issued the Building Permit Without the Unconstitutional Condition, and Has Since Issued a New Permit to a Subsequent Purchaser

While the parties were waiting for the trial court to issue its written order, the City went ahead and approved Mr. Rimmer's building permit without the offending permit condition. CP 18; CP at 322–326 (April 29, 2024 permit). It did

so, moreover, without availing itself of the opportunity to appeal the permit,[8] and without filing a lis pendens asserting a right to have the tree condition recorded on Mr. Rimmer's title depending on the outcome of the litigation. RCW 4.28.328(1)(a).

Although not part of the record in this case, this Court may take judicial notice that, after the appeal period expired, Mr. Rimmer sold the lot to Select Homes, a non-party to this case.[9] The City, thereafter, issued a "corrected permit" to the new owner on May 20, 2024—and it did so once again without the offending condition and without appealing the permit or

[8] ECDC §§ 20.06.020, .030.

[9] Evidence of the sale and subsequent permit is properly before this Court because the City's notice to title expressly incorporated the permit file for the subject property. Edmonds maintains the permit file on a publicly available website. https://weblink.edmondswa.gov/WebLink/Browse.aspx?id=123346&dbid=0&repo=Edmonds. Even if those documents fell outside the City's incorporation, this Court could take judicial notice of them under Washington Rule of Evidence 201, because those public documents are "not subject to reasonable dispute." *United States ex rel. Parikh v. Premera Blue Cross*, No. C01-0476P, 2006 WL 2841998, at *3–*4 (W.D. Wash. Sep. 29, 2006) (reports found on government websites are self-authenticating under Fed. R. Evid. 902(5)).

otherwise asserting any right to impose the tree condition pending the outcome in this litigation.[10] Select Homes has since built the house as permitted, and the City has issued a final certificate of occupancy for the home on April 30, 2025, effectively closing the permit.[11]

H. Stipulation, Final Judgment, and Appeal

Unable to resolve his damages claim, Mr. Rimmer noted a second motion for summary judgment seeking to establish the City's liability under 42 U.S.C. § 1983. CP 17–18. Rather than contest the motion, Edmonds filed a joint stipulation agreeing that (1) "the writ of mandate and writ of prohibition claims have been mooted by the City's approval of Mr. Rimmer's building permit on March 27, 2024," and (2) the trial court's declaratory ruling that the tree condition violated the doctrine of unconstitutional conditions will establish the City's liability for

[10] https://weblink.edmondswa.gov/WebLink/DocView.aspx?id=1686029 &dbid=0&repo=Edmonds
[11] https://weblink.edmondswa.gov/WebLink/DocView.aspx?id=2719998 &dbid=0&repo=Edmonds

damages under Section 1983 if upheld on appeal. CP 18. Thus, on December 13, 2024, the trial court entered final judgment in favor of Mr. Rimmer on his declaratory judgment claim and on the liability phase of his Section 1983 claim. CP 19. The court, thereafter, stayed the case pending this appeal. *Id.*

On January 8, 2025, Edmonds filed a notice of appeal, designating only the trial court's December 9, 2024, order on cross-motions for summary judgment. CP 1. The City does not appeal the December 13, 2024, order entering final judgment on the liability phase of Mr. Rimmer's Section 1983 claim. Opening Br. at 1–2.

STANDARD OF REVIEW

This Court reviews the trial court's conclusions and related evidentiary rulings on cross-motions for summary judgment de novo. *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The Court, moreover, may affirm an order granting summary judgment on any legal basis supported by the record. *Martinez-Cuevas v. DeRuyter Bros.*

Dairy, Inc., 196 Wn.2d 506, 514, 475 P.3d 164 (2020). In applying this standard, it is important to keep in mind that the heightened scrutiny burden of demonstrating nexus and proportionality was on the City, not Mr. Rimmer. *Dolan*, 512 U.S. at 395.

ARGUMENT

This case involves a straightforward application of the doctrine of unconstitutional conditions as set out by *Nollan* and *Dolan*. Edmonds' demand that Mr. Rimmer increase the area's tree canopy by planting and maintaining two new replacement trees as permanent fixtures on his property would unquestionably commit a per se physical taking if imposed directly. Thus, it is beyond reasonable dispute that the permit condition is an exaction. And the City's refusal to engage in the required nexus and proportionality analysis establishes a violation of the doctrine—full stop. Edmonds is not entitled to a second bite at the apple. The City issued a final permit without the offending condition, and the property has since been developed. Thus, there

is no opportunity for the City to engage in additional permitting deliberations on remand.

I. THE GENERAL FRAMEWORK OF TAKINGS LAW AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see also Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238–39, 17 S. Ct. 581, 41 L. Ed. 979 (1897) (incorporating the Takings Clause through the Fourteenth Amendment). Thus, when the government wants to take private property for some public use or project, it typically must compensate the owner at fair market value. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 273, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024). By requiring the government to pay for what it takes, the Takings Clause prevents the 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, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

The U.S. Supreme Court has identified two general categories of takings—"physical takings" and "regulatory takings"—with each category being held subject to its own distinct rules. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–23, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.").

A physical taking is the "paradigmatic taking" and occurs by "a direct government appropriation or [a] physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). A determination whether a physical taking has occurred "involves the straightforward application of *per se* rules." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233, 123 S. Ct. 1406, 155 L. Ed.

2d 376 (2003). "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). The size and scope of a physical invasion is immaterial to the analysis; even if the government only appropriates a tiny slice of a person's holdings, a taking has occurred, and the owner must be provided just compensation. *Tahoe-Sierra*, 535 U.S. at 322.

The U.S. Supreme Court's regulatory taking precedents apply a multifactorial balancing test to "laws that merely restrict how land is used," but do not demand a physical interest in it. *Sheetz*, 601 U.S. at 274. The primary questions in a regulatory takings claim ask whether the use restriction "saps too much of the property's value or frustrates the owner's investment-backed expectations." *Id*. (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

Apart from these two general categories, the Supreme Court has also identified a "special" category of takings claims for "land-use exactions," modeled on the doctrine of unconstitutional conditions. *Lingle*, 544 U.S. at 537. A land-use exaction occurs when the government demands real property or money from a land-use permit applicant as a condition of obtaining a building permit. *Koontz*, 570 U.S. at 599, 612, 616. Put simply, the exactions doctrine forbids the government from using its authority to condition a permit approval to take property that would be a per se taking if demanded outside the permitting context. *Id*. at 612. Thus, the predicate taking inquiry in an exactions case almost always calls for the application of the physical takings rule. *See, e.g.*, *Nollan*, 483 U.S. at 831–32 (access easement); *Dolan*, 512 U.S. at 393 (stream buffer and bicycle trail conditions); *Koontz*, 570 U.S. at 613–14 (demand to spend money to improve public lands).

The *Penn Central* test, by design, does not guard against the constitutional injury resulting from the abuse of leverage that

exists in unconstitutional conditions cases (let alone, the underlying physical taking). After all, the first factor in the *Penn Central* inquiry is the "economic impact of the regulation," 438 U.S. at 124, but the value of the permit in an exactions case is almost always "worth far more than property [the government] would like to take." *Koontz*, 570 U.S. at 605. And because a property owner will obtain some sort of benefit from a permit grant—even one accompanied by a confiscatory demand—*Penn Central* provides no protection against the kind of extortionate permitting scheme the U.S. Supreme Court warned about in *Nollan*. 483 U.S. at 837 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"). This is why exactions receive closer scrutiny than garden-variety regulatory takings.

Moreover, *Nollan-Dolan* and *Penn Central* view the constitutional injury very differently and, as a result, dictate very different remedies. Under *Nollan-Dolan*, a permit applicant will

suffer a cognizable constitutional injury the moment an unlawful exaction is imposed on the application—the owner, moreover, does not need to surrender property to be entitled to relief. *Koontz*, 570 U.S. at 607, 619. And *Nollan-Dolan* is unique among takings theories in that it authorizes injunctive relief and consequential damages (as pleaded under statutory authority). *Koontz*, 570 U.S. at 609; *Nollan*, 483 U.S. at 841–42. By contrast, *Penn Central* requires that the owner be deprived of nearly all value in his or her property, and it limits an owner's remedies to payment of just compensation. 438 U.S. at 120–22. Thus, *Penn Central* has no application to exactions cases.

II. THE TREE CONDITION IS AN EXACTION SUBJECT TO *NOLLAN-DOLAN* SCRUTINY

Edmonds' demand that Mr. Rimmer plant and maintain two unwanted trees as permanent fixtures on his property as a condition on the issuance of the building permit easily satisfies the doctrine's predicate taking inquiry. *Koontz*, 570 U.S. at 612 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person

asserting the claim to do what it attempted to pressure that person into doing."). That's because the U.S. Supreme Court has always held a condition subject to *Nollan-Dolan* scrutiny where the demand would effect a per se taking if imposed directly. *See, e.g.*, *Nollan*, 483 U.S. at 831–32 (access easement); *Dolan*, 512 U.S. at 393 (stream buffer and bicycle trail conditions); *Koontz*, 570 U.S. at 613–14 (demand to spend money to improve public lands).

It is black-letter law that "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred." *Cedar Point Nursery*, 594 U.S. at 149; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–33 n.9, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (regulation authorizing installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on the roof of an apartment building caused a per se taking). And the question "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Id*. at 437. "The placement of a fixed structure on land or

real property is an obvious fact that will rarely be subject to dispute." *Id*. "Once the fact of occupation is shown, of course . . . there is a taking." *Id*. at 438.

Edmonds does not contest that the permit condition requires a permanent occupation of Mr. Rimmer's property. Indeed, in its argument below, the City readily acknowledged that the condition required that the two replacement trees be installed and maintained as "a permanent feature" of the property. RP 20. The City furthermore acknowledged that the trees would limit his use of the property. RP 25 ("We don't challenge the fact that—the fact that Mr. Rimmer has to have these two trees on his property. It does limit his use of the property. That's—we concede that point."). In this way, the City admitted that, due to the trees, Mr. Rimmer's rights in his property would be more limited and circumscribed than they were before the occupation. *See Loretto*, 458 U.S. at 431 (explaining that a permanent physical occupation effects a compensable taking because it "subtract[s] from the owner's full

enjoyment of the property and . . . limit[s] his exploitation of it") (quoting *United States v. Causby*, 328 U.S. 256, 264–65, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946)).

Unable to contest that the permit condition demanded a permanent physical occupation of Mr. Rimmer's property, Edmonds urges this Court to hold its demand exempt from the physical taking rule. But its arguments in this regard are baseless.

A. The Permit Condition Strips Mr. Rimmer the Essential Rights of Ownership

Edmonds' primary argument for avoiding the physical takings rule is based on its insistence that Mr. Rimmer will "own" the replacement trees due to fact that the City code mandates that they be planted on his property. Opening Br. at 22, 32–34. According to the City, Mr. Rimmer's compelled ownership of the trees should defeat the predicate taking claim as a matter of law. *Id*. at 32–33 (citing *Loretto*, 458 U.S. at 440 n.19). The City bases its argument on a footnote in which the *Loretto* majority observed that, had Mrs. Loretto owned the government-mandated cable box, then the case "*might* present a

different question from the question before us." 458 U.S. at 440 n.19 (emphasis added).

But the City offers no authority endorsing its reading of footnote 19, nor does it offer any authority supporting its claim that ownership of a government-mandated installation will require that the physical occupation be analyzed under the *Penn Central* test. *See F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987) (explaining that it was the "element of *required acquiescence*" to the occupation that was "at the heart" of *Loretto*) (emphasis added).

The U.S. Supreme Court has admonished against reading excerpts from its opinions to create bright-line defenses to the Takings Clause, emphasizing the need to harmonize such statements with the entire opinion. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31, 36, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) ("[T]he first rule of case law as well as statutory interpretation is: Read on."). And when footnote 19 is read in context, it is clear that the Court's discussion of

ownership focused on whether Mrs. Loretto controlled the use and disposition of the cable box and the property on which it was affixed. *Loretto*, 458 U.S. at 435, 440 n.19. That question, which focuses on the burden imposed on the owner, central to the Supreme Court's physical takings caselaw. *See, e.g.*, *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 524, 217 P.3d 546 (2009) (reading footnote 19 to state that "the determination of whether the landlord maintained control over the property, or if that control was given to a third party, was an important aspect of determining if there was a per se taking").

Loretto explained that ownership consists of the group of rights inhering a person's relation to the physical thing, which traditionally includes the rights "to possess, use and dispose of it." 458 U.S. at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945)); *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 361, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (discussing the rights inherent in ownership of raisins).

Loretto explained that a permanent physical occupation is subject to per se treatment because affixing an object to one's property "will effectively destroy each of those rights." *Loretto*, 458 U.S. at 435. First, the owner "has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id*. Second, "the permanent physical occupation of property forever denies the owner any power to control the use of the property." *Id*. at 436. And third, "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id*.

That discussion set the stage for footnote 19. The dissent argued that ownership of the compelled fixture was "incidental" to the physical taking inquiry, and that what should really matter are the benefits and burdens attributable to the cable box. *Id*. at 449–50 (Blackmun, J., dissenting). The majority sharply

disagreed, explaining in a footnote that "[t]he fact of ownership is . . . not simply 'incidental'" to the physical takings inquiry; instead, a determination of *true rather than bare* ownership, *id*. at 435–36, will establish who has the right to control "the placement, manner, use, and possibly the disposition of the installation." *Id*. at 440 n.19. It will also establish whether the landowner has the right to decide how to maintain the government-mandated fixture and/or to construct in the area of the government fixture without having to obtain another person's permission or cooperation. *Id*. Thus, the majority offered that, if the landowner could be shown to hold those rights in the fixture, then the case "might present a different question from the question before us." *Id*.

Because the constitutional definition of ownership turns on a determination whether the landowner holds the rights "to possess, use and dispose of it," *Loretto*, 458 U.S. at 435, the City's naked assertion that "the permit condition . . . keeps the two replacement trees in Rimmer's private ownership" is simply

not enough to show that the trial court's predicate taking conclusion was reversible error. Opening Br. at 22, 32–33; CP 13. Instead, to show error, the City must provide evidence that Mr. Rimmer will have the right to control the use and disposition of the trees and the land on which they are installed. *See St. Louis & S.F. Ry. Co. v. Gill*, 156 U.S. 649, 664, 15 S. Ct. 484, 39 L. Ed. 567 (1895) (ownership presents a mixed question of law and fact).

The record, however, is determinative against the City. While the code provides that Mr. Rimmer can select the species of the replacement trees from the City's list of acceptable trees and additionally provides that the arborist can designate where the trees will be located,[12] once planted the permit condition would deprive Mr. Rimmer of all of the essential attributes of ownership in the trees and the land on which they are located. CP 113–115.

[12] CP 164, 170 (ECDC §§ 23.10.060(B)(2)(b), .080(D)).

Speaking first to the trees, the City code (incorporated into the condition) states that Mr. Rimmer may not relocate, replace, top, or remove the trees without City permission.[13] Mr. Rimmer cannot even prune the trees unless he can convince the City that the "pruning will be undertaken only to the extent necessary for public safety or tree health."[14] And if Mr. Rimmer removed or sold the trees without the City's permission, Edmonds would be entitled to reimbursement for them.[15]

The permit condition also strips Mr. Rimmer of his rights in the land on which the trees must be planted. Mr. Rimmer may not freely use or develop the land where the trees are planted because the condition requires him to allow the trees to mature in a manner that is unimpeded by his private uses of his property.[16] Indeed, were Mr. Rimmer to use the property, such use would be deemed "tree removal" if the City determined that

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[13] CP 161 (ECDC § 23.10.020(V); ECDC § 23.10.030).
[14] CP 162 (ECDC § 23.10.040(E)).
[15] CP 172 (ECDC § 23.10.100(C)(2)).
[16] CP 182.

it impacted the trees or their root systems,[17] and would expose Mr. Rimmer to criminal and civil liability.[18]

That is not ownership in its constitutional sense. *Loretto*, 458 U.S. at 435, 440 n.19. Instead, Edmonds has used the permit condition to appropriate rights in the trees and land on which they are planted "as clearly 'as if the Government held full title and ownership."' *Horne*, 576 U.S. at 364; *see also id*. (a government demand that deprives an owner of the "right to control the[] disposition" of his property is a per se taking). Thus, the trial court rightly decided Mr. Rimmer's predicate taking under the U.S. Supreme Court's physical taking rule. CP 13.

1. The Physical Taking Rule Applies to Government Acts that Authorize Occupations by Objects

To the extent that Edmonds claims that the physical occupation rule is limited to government-mandated fixtures that

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[17] CP 161 (ECDC § 23.10.020(V)) (defining "tree removal" as "the direct or indirect removal of a tree(s) or vegetation" if the owner's actions have the potential to impact over 20% of a tree's root system).
[18] CP 172 (ECDC § 23.10.100).

are installed by strangers, it is also wrong. Opening Br. at 30–35. Again, the City's argument hyper-fixates on *Loretto*'s observation that the New York regulation had authorized a "stranger" or a "third-party" to install the cable box when applying the physical takings rule to the facts of the case. *Id*. But Edmonds overlooks that the U.S. Supreme Court has applied the physical takings rule in a variety of different contexts, including physical occupations that did not involve any entry to private property by a person. *Arkansas Game & Fish*, 568 U.S. at 31.

As noted in *Loretto*, the rule was first developed when determining whether offsite government actions that resulted in the flooding of a downstream property constituted a compensable taking. *Loretto*, 458 U.S. at 436 (citing *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 20 L. Ed. 557 (1872)). Even though no third party entered the property in *Pumpelly*, the Court held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to

effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." 13 Wall. (80 U.S.) at 181. That ruling has since become one of the foundational principles of the Court's physical takings caselaw.[19] *See Loretto*, 458 U.S. at 427.

Indeed, that principle was central to *United States v. Causby*, 328 U.S. 256. There, the Court concluded that noise from military overflights resulted in a taking of a chicken farm, even though the military was authorized to fly over the property and there was no actual physical invasion or occupation of his land. *Id*. at 263–65. Applying the principle announced in *Pumpelly*, the Court held that the government committed a taking because its actions exercised "dominion and control over" the

[19] The Court has consistently applied that principle to find takings where offsite government actions result in a physical occupation of private property. *See, e.g.*, *United States v. Lynah*, 188 U.S. 445, 468–70, 23 S. Ct. 349, 47 L. Ed. 539 (1903); *Bedford v. United States*, 192 U.S. 217, 225, 24 S. Ct. 238, 48 L. Ed. 414 (1904); *United States v. Cress*, 243 U.S. 316, 327–28, 37 S. Ct. 380, 61 L. Ed. 746 (1917); *Sanguinetti v. United States*, 264 U.S. 146, 149, 44 S. Ct. 264, 68 L. Ed. 608 (1924); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809–10, 70 S. Ct. 885, 94 L. Ed. 1277 (1950).

affected portion of Mr. Causby's farm. *Id.* at 362; *see also Waverley View Invs., LLC v. United States*, 135 Fed. Cl. 750, 797 (2018) (government's installation of monitoring wells effected a physical occupation taking even though it had a right of entry to the property).

Reviewing its past physical takings precedents, the *Loretto* Court emphasized that there is no authority "suggest[ing] that a permanent physical occupation would ever be exempt from the Takings Clause." 458 U.S. at 432. That's because the U.S. Supreme Court's physical takings caselaw focuses instead on whether "the specific facts set forth would warrant a finding that a servitude has been imposed." *Causby*, 328 U.S. at 261 (citation omitted). Thus, the fact that Edmonds demanded that Mr. Rimmer—rather than a stranger—plant the trees does not change the fact that it has ordered that he maintain the trees as permanent fixtures on his property.

2. Edmonds' Arguments Pertaining to Ownership Are Not Properly Before the Court

Ultimately, this Court need not address Edmonds' argument regarding ownership of the trees because the City didn't raise this issue in either its opening brief on summary judgment or response to Mr. Rimmer's motion for summary judgment. CP 74–99, 136–150; *see also Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) ("A party moving for summary judgment must raise, in its opening memorandum, all the issues on which it believes it is entitled to summary judgment."). Instead, the City first raised this issue in its reply brief. CP 39–40. Thus, the trial court could not consider the argument when ruling on summary judgment.[20] *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991).

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[20] Moreover, Edmonds' claim that Mr. Rimmer would own the trees consists of a single conclusory sentence with no argument, citation to the record, or citation to authority. Opening Br. at 33; CP 40. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). And the Court will not consider claims unsupported by legal authority, citation to the record, or argument. RAP 10.3(a)(6);

B. The City's Insistence That an Unconstitutional Conditions Claim Requires a Formal Conveyance Is Baseless

Edmonds alternatively argues that a permit condition demanding that the owner suffer a physical occupation will never constitute an exaction unless the owner formally conveys the demanded property via deed or covenant. Opening Br. at 2, 16–22, 40, 42.

The City is wrong.

There is nothing in the U.S. Supreme Court's caselaw that requires a permit applicant to formally convey the demanded property before the protections of the Takings Clause will apply. Indeed, the U.S. Supreme Court has admonished that, in evaluating a physical taking claim, it does not "consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law." *Cedar Point Nursery*, 594 U.S. at 156; *Causby*, 328 U.S. at 262

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

(explaining that the lack of formal occupation was "as irrelevant" to the takings inquiry "as the absence in this day of the feudal livery of seisin on the transfer of real estate"); *see also*, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16, 71 S. Ct. 670, 95 L. Ed. 809 (1951) (finding a physical taking without the government offering to acquire rights by purchase beforehand); *General Motors*, 323 U.S. at 375 (same). "To hold otherwise would allow the government to circumvent paying just compensation for taking private property by simply not offering to acquire the rights in advance." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1293 (Fed. Cir. 2008). Thus, Judge Appel rightly observed that it "really doesn't matter" to the predicate taking inquiry whether the City demanded that its tree condition be memorialized in a formal conveyance. RP 56.

To the extent Edmonds argues that a formal conveyance requirement is found in the doctrine of unconstitutional conditions, it is also wrong. There is no such requirement. *Koontz*, 570 U.S. at 604–05. The City simply tries to create such

a requirement by inserting the word "conveyance" to the predicate taking inquiry.[21] Opening Br. at 18 (stating in their own words that an "exaction occurs when a government conditions approval of a permit *on the conveyance of an interest in private property, or when it demands the payment of a fee in lieu of that conveyance*") (emphasis added).

The doctrine's predicate taking inquiry asks only whether the permit condition would be a compensable taking if imposed

[21] Although not pertinent to this case, it is important to note that *Koontz* did not limit its holding to fees in lieu of a formal conveyance of real property. *Koontz*, 570 U.S. at 619 ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* . . . even when its demand is for money."). Nor is there any basis in the decision to infer such a limitation. Indeed, the Florida courts—which were the factfinders in *Koontz*—determined that the challenged permit condition was a "non-land-use monetary condition" that had been imposed "in the absence of a compelled dedication of land." *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So.3d 396, 397–98 (Fla. Dist. Ct. App. 2014); *see also St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So.3d 8, 12 (Fla. Dist. Ct. App. 2009) (The district's permit condition "did not involve a physical dedication of land but instead a requirement that Mr. Koontz expend money to improve land belonging to the District.").

outside the permitting context. *Koontz*, 570 U.S. at 605; *see also id*. at 599 (defining an exaction as a permit condition requiring the owner to "relinquish[] of a portion of his property"); *id.* at 606 (an exaction is a permit condition demanding "that the applicant turn over property"). The fact that the permit conditions in *Nollan* and *Dolan* required the applicants to record deed restrictions[22] does not mean that the *only* way that the government can take property is to demand a deed. To the contrary, it merely represents one of "the nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game & Fish*, 568 U.S. at 31.

While a formal conveyance is not *necessary* to establish the predicate taking, the existence of such a demand in this case provides *additional* evidence of Edmonds' appropriative intent. *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 91 L. Ed. 1382 (1947) ("Property is taken in the constitutional sense

[22] *Nollan*, 483 U.S. at 833 n.2; *Dolan*, 512 U.S. at 385.

when inroads are made upon an owner's use of it to an extent that . . . a servitude has been acquired either by agreement or in course of time."). And in determining whether the notice to title seeks to appropriate an interest in Mr. Rimmer's property, it does not matter whether the note to title meets the requirements of Washington's conveyance statutes—what matters is its effect.[23] *Cedar Point Nursery*, 594 U.S. at 156.

[23] Washington's law on conveyances states that a city may acquire a property interest in a portion of one's land for conservation purposes by means of a "covenant, restriction, or other right . . . to protect . . . or conserve for open space purposes." RCW 64.04.130. The "notice on title" provision of Edmonds' tree ordinance mirrors that statutory language by stating that a "tree retention and protection plan" may be made "permanent[]" by means of an "easement, tract, or covenant restriction" that must be recorded in the notice to title "against the property." CP 171 (ECDC § 23.10.085). Consistent with those provisions, the City's senior planner repeatedly characterized the notice as a "covenant" when demanding that Mr. Rimmer record the document with the Snohomish County auditor. CP 191, 209, 215, 221; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818–19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (government officials have a duty to know the law in the areas of their responsibility).

On summary judgment, Edmonds told the trial court that its intention in requiring that Mr. Rimmer record the notice was to bind future owners to the terms of the tree protection plan because "[t]he code currently does not regulate tree retention for properties that are not subject to development."[24] CP 139. "Therefore, if the notice on title requirement were not in place, a future owner of the property might not realize that the development condition prevented removal of the trees." CP 139; CP 35 (the notice "provides notice that a condition exists in the City's permit file"); *see also* RP 15 ("The notice that is recorded provides notice of the condition."). In this way, the City figured it could ensure that the replacement trees "gain[ed] protected status that endures after the development is completed." CP 139. That is the functional equivalent of a restrictive covenant.[25]

[24] *See Garcia v. City of Los Angeles*, 11 F.4th 1113, 1123–24 (9th Cir. 2021) (appellate court may rely on statement made in a party's summary judgment briefs when determining an appeal).
[25] A notice to title generally serves to inform parties about claims, encumbrances, or interests in real property, impacting the rights and obligations of subsequent purchasers or parties dealing with

Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010) (A covenant is a restriction that "derogate[s] an owner's common law right to use land for all lawful purposes," which must be recorded to "remain intact despite changes in ownership of the land.") (cleaned up, citations omitted).

C. *Penn Central* Has No Application Here

In a last-ditch effort to avoid liability, Edmonds argues that the trial court should have dismissed Mr. Rimmer's petition and complaint because he didn't allege a regulatory taking under the deferential multifactorial test established by *Penn Central*, 438 U.S. at 124.[26] Opening Br. at 22–23, 25–26, 35, 42. Wrong

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the property. *Larson v. Snohomish Cnty.*, 20 Wash. App. 2d 243, 260–61, 499 P.3d 957 (2021); *see also Dickson v. Kates*, 132 Wn. App. 724, 737, 133 P.3d 498 (2006) (recording a notice to title is "intended to provide constructive notice to land possessors who have restrictions burdening their land").

[26] Edmonds' argument on this issue is hard to track. At times, the City argues that the trial court should have evaluated the predicate taking inquiry under *Penn Central* rather than *Loretto*; while at other times, it argues that the court should have applied *Penn Central*'s multifactor test to the condition instead of the *Nollan-Dolan* tests. Opening Br. at 22–23, 25–26, 35. But in its

again. "Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place." *Cedar Point Nursery*, 594 U.S. at 149; *see also Horne*, 576 U.S. at 361 (same); *Tahoe-Sierra*, 535 U.S. at 323 (same). Because the City conceded that it demanded that Mr. Rimmer maintain the trees as "a permanent feature" of his lot and in a manner that would limit his use of the property (RP 20, 25), the trial court did not err when it evaluated Mr. Rimmer's claims under the physical taking rule.

The federal district court's order in *Fox v. City of Pacific Grove, California*, illustrates the difference between a regulatory restriction (subject to *Penn Central*) and Edmonds' demand for a permanent physical occupation of private property. No. 24-CV-03686-EKL, 2025 WL 240764 (N.D. Cal. Jan. 17, 2025).[27] In

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conclusion and prayer for relief, the City argues that Mr. Rimmer's complaint should be dismissed outright because he didn't allege a taking under *Penn Central*. Opening Br. at 42.

[27] *Appeal dismissed Fox v. City of Pac. Grove*, No. 25-645, 2025 WL 1275780 (9th Cir. Feb. 28, 2025).

Fox, Pacific Grove adopted a tree ordinance that regulated only the removal of certain trees from public and private property—it imposed no replacement requirement and no requirement that the owner establish a tree protection area. *Id*. at *1. The Pacific Grove ordinance, moreover, did not use permit conditions to enforce its tree retention requirements. *Id*. Thus, the owner in that case did not allege a violation of *Nollan-Dolan*. *Id*. at *3–*4. Instead, the owner claimed that the regulation resulted in a physical occupation—a claim that the district court rejected because the ordinance regulated the *existing* conditions on the owner's property, concluding that the ordinance "does not grant the City title to any part of Fox's property" and does not "authorize the government or any other person *or object* the right to enter and occupy Fox's property." *Id*. at *3 (emphasis added).

But Edmonds' ordinance demanded significantly more than what Pacific Grove's tree ordinance (and similar laws) required. Edmonds wanted to force owners to provide replacement trees "in an amount sufficient for the gain to exceed

the loss." *See* CP 159 (ECDC § 23.10.000(L)). And it wanted to control those trees in perpetuity. And the City furthermore chose to condition issuance of Mr. Rimmer's permit on a requirement that he replace a single ornamental tree with two new trees and to dedicate a portion of his lot to their perpetual maintenance. Thus, the City knowingly chose a means and end that directly implicates the doctrine of unconstitutional conditions predicated on a physical occupation. RP 22. The trial court correctly applied the *Nollan-Dolan* doctrine to determine the constitutionality of the permit condition.

III. THE CITY CANNOT MEET ITS BURDEN OF PROVING NEXUS AND PROPORTIONALITY

Edmonds does not seriously contest the trial court's conclusion that that the City "has not carried its burden under *Nollan-Dolan* of demonstrating that the exaction satisfies the 'essential nexus' and 'rough proportionality' tests." CP 13. That is because it cannot credibly do so. The heightened scrutiny nexus and proportionality tests require the government to "make some sort of 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. And the City admits that it did not engage in the required analysis. CP 68. Thus, the *only* relevant evidence in the record is the arborist report, which disclosed no impacts arising from the proposed removal of the dogwood. CP 182; CP 93 n.3; CP 165 (ECDC § 23.10.060(b)(2)(c)(v)) (requiring arborist report to identify any impacts of tree removal). The record, therefore, establishes a violation of *Nollan-Dolan*.

A. The City's Post-Hoc Arguments Can't Establish a Nexus

While the nexus test is ordinarily met "with ease," *F.P. Dev., LLC v. Charter Twp. of Canton, Michigan*, 16 F.4th 198, 207–08 (6th Cir. 2021), it still requires substantially more effort than is provided by Edmonds. Addressing nexus, the City offers the tautology that requiring an owner to replace a significant tree advances its interest in replacing significant trees. Opening Br. at 38. But that argument relies on a code provision deeming the dogwood "significant" and subject to replacement. And nexus

can't be met by simply referencing regulatory standards. *Hill v. City of Portland*, 293 Or. App. 283, 286, 428 P.3d 986 (2018); *see also Nollan*, 483 U.S. at 841–42 (standing alone, a showing that the condition serves a regulatory purpose merely indicates that the government has an interest in putting to property to a public use and should pay for it).

Instead, to satisfy nexus, the government must take the additional step of showing that the proposed development will either create or exacerbate the public problem that the condition addresses. *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019); *see also Hill*, 293 Or. App. at 286–90 (government must identify and "take into account a proposal's impacts" on the public problem that the provision seeks to address) (cleaned up); *Fassett v. City of Brookfield*, 975 N.W.2d 300, 307 (Wis. Ct. App. 2022) (to establish nexus, the government must "tie" its legislative interest to an "impact caused by the proposed [development]"); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874

(9th Cir. 1991) ("[A]n exaction on developers can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate.").

Edmonds does not address that essential step in the nexus analysis. Opening Br. at 37–38. Indeed, it cannot do so where it offered no evidence of impacts during the permitting phase or at trial. CP 13; CP 68; *see also* CP 182 (arborist report identifying no impacts attributable to the tree's removal). The trial court rightly concluded that, based on the record, "the City cannot show that the removal of a single tree from Mr. Rimmer's property will cause any public impact requiring mitigation." CP 13.

B. The City's Post-Hoc Arguments Can't Establish Proportionality

As a matter of logic, an exaction that fails nexus cannot possibly satisfy proportionality. Without a nexus, there is no pertinent impact to which the exaction can be proportional. But even if the City *could* establish a nexus, its demand for two

replacement trees would still fail the proportionality test because it cannot show that the exaction does not exceed the doctrine's project-impact mitigation standard. *Dolan*, 512 U.S. at 384; *Koontz*, 570 U.S. at 604–05; *see also Sheetz*, 601 U.S. at 276 ("A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose.").

Edmonds does not address the requirements of the proportionality test and offers no basis to depart from the trial court's conclusion that the City "failed to establish that its demand that Mr. Rimmer plant and perpetually maintain two new replacement trees is roughly proportional to any adverse public impacts of his proposed residential development, including his planned removal of a single dogwood tree." CP 13.

As mentioned above, *Dolan* places a heightened scrutiny burden on the government to demonstrate that the exaction is proportionate to the project's impacts. 512 U.S. at 391. To meet

this burden, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. While "[n]o precise mathematical calculation is required," the government "must make some effort to quantify its findings in support of the dedication." *Id*. at 395–96. In doing so, the government cannot rely on "generalized statements" that are "too lax to adequately protect" constitutional rights. *Id*. at 389.

The City claims that proportionality was established by the arborist's report. Opening Br. at 39. But, as discussed above, the arborist reported no impacts attributable to the removal of the dogwood tree. CP 182. Thus, the report made no findings that planning two new native trees will roughly offset the impacts of removing the flowering dogwood. *Id*. Instead, the arborist simply stated that the City's tree code required a 2:1 replacement requirement—a requirement enacted pursuant to the City's intent that "the impacts on the ecological integrity caused by the

development are outweighed by [mitigation] measures . . . and compensate for any remaining impacts in an amount sufficient for the gain to exceed the loss." CP 159 (ECDC § 23.10.000(L)). Thus, by applying the required replacement ratio with no impact analysis, the arborist's report merely begs the questions posed by the proportionality test.

Edmonds' post-hoc arguments do not make up for the missing analysis. Certainly, the two replacement trees will be smaller than the mature dogwood *when they are saplings*. Opening Br. at 39-40. But, as the City acknowledged below, the permit condition did more than just demand that Mr. Rimmer plant young trees—it required Mr. Rimmer to allow the trees grow to full maturity on his property without interference. RP 22; CP 182. Thus, if proportionality could be demonstrated based on measurements alone (Edmonds provides no authority for that conclusion), even the smallest native species would likely double

the height and spread of the dogwood.[28] However, this Court need not address the City's conjectural claims in this regard because such arguments merely serve to highlight questions that *Dolan* requires it to answer *before* demanding the condition.

Edmonds' failure to establish proportionality is further illustrated by the Sixth Circuit's opinion invalidating a similar tree condition in *F.P. Dev.*, 16 F.4th at 205–08. At issue was a tree retention ordinance that generally prohibited landowners from removing certain trees without a permit and, where a tree must be removed to accommodate development, required the owner to mitigate the removal by either replacing the tree or paying into a public tree fund. *Id.* at 201–02. Like Edmonds' tree ordinance, the Canton 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

[28] https://www.edmondswa.gov/services/sustainability/trees

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 F.P. either plant 187 new replacement trees or pay $47,898 into the 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 demand violated the proportionality test because the condition was imposed 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. To satisfy proportionality, 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 replacement condition unconstitutional. *Id*. at 208.

A Michigan appellate court reached the same conclusion in the companion case, *Charter Township of Canton v. 44650, Inc.*, 346 Mich. App. 290, 327–28, 12 N.W.3d 56 (2023). At issue was the township's application of 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 298–301. Applying the same 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 tree fund. *Id*. Like the Sixth Circuit, the Michigan appellate court concluded that the township's

application of predetermined mitigation ratios violated the proportionality test because, as here, there was "no evidence in the record . . . that this required mitigation bears any relationship to the impact of defendant's tree removal." *Id*. at 328.

Similarly, in *Mira Mar Development v. City of Coppell*, 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 74, 95–96 (Tex. Ct. App. 2013). There, a property owner applied to the City of Coppell for a development permit. *Id.* at 95. Like Canton, the city conditioned issuance 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 concluded that the government failed to provide evidence establishing rough proportionality because 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 the proportionality test for the same reasons.

C. The City Is Not Entitled to a Do-Over

Having no defense to the merits of Mr. Rimmer's unconstitutional conditions claim, the City asks that it be given another chance to evaluate nexus and proportionality on remand. City Resp. Br. 20 n.3. This request is without merit or precedent. Indeed, there is no lawful procedure available for the City to reconsider and reimpose the tree condition. The City approved the permit on March 27, 2024 (CP 18), and closed the permit after construction was completed on April 30, 2025.[29] And because Edmonds issued the permit without the challenged

[29] This Court may take judicial notice of Edmonds publicly available permit status website, https://permitsearch.mybuildingpermit.com/PermitDetails/BLD2022-0381/Edmonds

condition, it filed a stipulation that "the writ of mandate and writ of prohibition claims have been mooted by the City's approval of Mr. Rimmer's building permit."[30] CP 18. That stipulation is binding on this appeal. *de Lisle v. FMC Corp.*, 41 Wn. App. 596, 597, 705 P.2d 283 (1985). The permit can't be reopened.

D. Affirming the Trial Court's Judgment Will Not Upend Ordinary Land-Use Regulations

Edmonds' concern that applying *Nollan/Dolan* in this case will undermine ordinary land-use regulations is overblown. Opening Br. at 34–35. The physical taking rule has been in place for nearly 150 years and the *Nollan-Dolan* doctrine has been in place for almost 40 years, and ordinary land-use regulation continues to thrive. Indeed, the City can't muster a single example of a code providing for things like fire extinguishers,

[30] The City did not exercise its right to appeal the permit. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (an appeal is moot if the court cannot provide effective relief); *Chelan County v. Nykreim*, 146 Wn.2d 904, 925, 52 P.3d 1 (2002) ("If there is no challenge to the decision . . . the issue of whether the [decision] is compatible with [applicable code] is no longer reviewable.").

retaining walls, grease traps, and the like being deemed a physical taking or an unconstitutional exaction. Opening Br. at 34–35. That is because such ordinary requirements "will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point*, 594 U.S. at 160; *Loretto*, 458 U.S. at 440 ("our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like").

IV. MR. RIMMER SHOULD BE AWARDED ATTORNEYS' FEES ON APPEAL

Edmonds stipulated that, if upheld on appeal, the trial court's conclusion that the City violated *Nollan-Dolan* will establish liability under 42 U.S.C. § 1983. CP 18. Thus, should this Court affirm the trial court's judgment, Mr. Rimmer requests that it order Edmonds to pay his attorneys' fees on appeal under Section 1988. *See Maine v. Thiboutot*, 448 U.S. 1, 11, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (attorneys' fees are considered an

"integral part" of Section 1983 remedies); *see also Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001) (attorney fee awards to prevailing Section 1983 plaintiffs are "virtually obligatory").

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment and grant Mr. Rimmer attorneys' fees on appeal as provided by 42 U.S.C. § 1988.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the rules of this Court and contains 11,973 words.

DATED: August 5, 2025.

Respectfully submitted,

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DECLARATION OF ELECTRONIC SERVICE

The undersigned declares that all parties' counsel will receive electronic notice of the filing of this document at the Washington State Appellate Courts' Portal.

DATED: August 5, 2025.

s/ *Brian T. Hodges*
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