Case No: 87644-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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INTRODUCTION

Respondent Nathan Rimmer submits this answer to the amicus curiae brief filed by the Washington State Association of Municipal Attorneys ("WSAMA"). WSAMA's brief relies on the false premise that Edmonds' tree condition "never materialized" and that Mr. Rimmer, therefore, "jumped the gun" by filing an unconstitutional conditions claim before the City had an opportunity to reach a final decision regarding its replacement tree condition. And from that false narrative, amicus interjects a series of jurisdictional objections and urges the Court to impose new limits on the U.S. Supreme Court's physical takings rule and the unconstitutional conditions doctrine.

But this is not the case WSAMA wants it to be. Edmonds did *in fact* impose its tree demand as a condition precedent to receiving a final decision on Mr. Rimmer's building permit application. CP 74, 95, 136, 190–91, 283. And that condition demanded a physical interest in Mr. Rimmer's property. RP 20, 23; CP 188, 190–91. Thus, the trial court correctly exercised its

authority to declare the condition unconstitutional under *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 & n.8, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

WSAMA's refusal to acknowledge the existence of the condition (and its terms) undercuts its arguments, and adds nothing to question the trial court's judgment.

ARGUMENT

I. JUSTICIABILITY

A. Mr. Rimmer Stated a Justiciable Claim for a Violation of the Doctrine of Unconstitutional Conditions

Mr. Rimmer's complaint sought declaratory relief and damages from Edmonds' imposition of an unconstitutional condition on his permit application under the Uniform Declaratory Judgments Act (UDJA), Ch. 7.24 RCW, and 42

U.S.C. § 1983.[1] CP 282–84. Specifically, his claims challenged the City's demand "that he dedicate property to a public use as a condition precedent to receiving a final decision on his building permit application."[2] CP 270; *see also* CP 74 (City brief acknowledging that Mr. Rimmer's complaint challenged "unconstitutional conditions [imposed] on his permit application"); CP 95 (City brief acknowledging that "the City has

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[1] Mr. Rimmer's complaint seeks damages ordinarily awarded in cases where the government withholds a permit due to the owner's objection to an unlawful condition. *See, e.g.*, *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992) ("a plaintiff may recover money damages" under Section 1983 for injuries attributable to a city's imposition of an unlawful permit condition); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 645, 656, 698, 935 P.2d 555 (1997) (an owner may recover such damages attributable to delay in issuance of permit, and the loss of the use of the monetary value); *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 (Fla. Dist. Ct. App. 2014) (affirming award of $376,154 in compensatory damages—representing the rental value of the property for the six years that the government wrongfully withheld the permit due to owner's objection to an unconstitutional condition).

[2] Edmonds chose not to file an Answer to Mr. Rimmer's Complaint and is deemed to have admitted all factual allegations therein. CR 8(b), (d); *Jansen v. Nu-West, Inc.*, 102 Wn. App. 432, 438, 6 P.3d 98 (2000).

processed the permit [application] and conditioned it"); CP 136 (City brief stating that Mr. Rimmer "applied for a residential building permit to develop his lot, and the City placed conditions on the permit issuance in accordance with chapter 23.10 of the Edmonds Community Development Code (ECDC)").

Mr. Rimmer's unconstitutional conditions claim was specifically authorized by *Koontz v. St. Johns River Water Management District*, which holds that the doctrine applies with equal force to conditions imposed on an approved permit and "conditions precedent to permit approval." 570 U.S. 595, 606, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). And the timing of his claim was authorized by *Pakdel v. City and County of San Francisco*, which holds that an owner may challenge the constitutionality of a permit condition once the government is committed to a position and "there is no question about how the regulations at issue apply to the particular land in question."[3] 594

[3] *See also Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 957, 962–66, 954 P.2d 250 (1998) (concluding that a city's

U.S. 474, 478–79, 141 S. Ct. 2226, 210 L. Ed. 2d 617 (2021) (citation modified).

The record confirms that the City would not alter or remove the condition. On May 10, 2022, Edmonds stated that it would not issue a permit unless Mr. Rimmer first complied with the tree replacement condition by recording "the covenant" supplied by the City. CP 190–91. And the City held firm to its position that its demand for a recorded covenant was a condition precedent throughout the permitting process (and this litigation). CP 95, 190–91, 209, 215, 221, 274; Opening Br. at 5–7 (explaining that Edmonds' tree ordinance "required the building permit to be conditioned on its replacement with two smaller trees planted elsewhere on the property" and additionally required that Mr. Rimmer record the notice to title "as a condition of permit issuance").

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refusal to process a land use application that satisfied all criteria for approval deprived the owner of its federal constitutional rights and established a violation of § 1983).

On April 14, 2023, after several attempts to get the City to respond to his objection to the permit condition, Mr. Rimmer sent a letter to the City's senior planner asking, "Please either issue the building permit or deny the permit so that we may have the Hearing Examiner make a determination." CP 203; *see also* CP 230 (asking the City to either "approve the application without the offending condition, or issue a conditioned approval"). And on June 9, 2023, Mr. Rimmer asked the City to approve the application and issue the permit with the condition attached, rather than treating the demand as "a precondition of receiving a permit decision." CP 205. The City rejected each request, holding firm to its decision that it would *never* issue a permit unless Mr. Rimmer first recorded the tree covenant. CP 95, 190–91, 209, 215, 221, 274, 278, 283. Then, on June 21, 2023, the City told Mr. Rimmer that if he didn't immediately record the tree covenant, it would expire his application rather than deny it. CP 221.

Contrary to amicus' suggestion, no amount of waiting by Mr. Rimmer would've resulted in the City's issuance of an appealable, conditioned permit. WSAMA Br. at 10. Edmonds was entrenched. And if Mr. Rimmer had waited any longer, the City would've expired his application and he would've lost his substantial investment and valuable vested rights in the permit. CP 68, 221. Edmonds admitted on the pleadings that the "only matter that is stopping the City from approving the application is a dispute concerning … the constitutionality of the [tree condition] itself." CP 278. Thus, the City argued on summary judgment that Mr. Rimmer's declaratory judgment claim was the appropriate mechanism for resolving the parties' dispute.[4] CP 94.

[4] Contrary to amicus' argument, Edmonds' summary judgment briefs challenged Mr. Rimmer's mandamus and prohibition claims on ripeness grounds, insisting that the Court must resolve the declaratory judgment claim before it can determine whether to compel further action on the application. CP 94–95.

B. WSAMA's Jurisdictional Arguments Are Baseless

1. Statutory Preemption

Mr. Rimmer's UDJA and § 1983 claims are not preempted by the Land Use Petition Act (LUPA), Ch. 36.70C RCW. Per its plain terms, LUPA applies only to "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination." RCW 36.70C.020(2)(a); RCW 36.70C.030. But, as Edmonds stated throughout, the City did not issue a final permit decision because it required a recorded covenant as a condition precedent to issuance of a final decision. CP 74, 95, 136; Opening Br. at 5–7. Indeed, the City told the trial court that it would take no further action on Mr. Rimmer's application unless and until the trial court declared that the condition was an exaction. CP 94–95. The City accordingly admitted on the pleadings that its decision to impose the demand as a condition precedent prevented Mr. Rimmer from challenging the condition to the hearing examiner, which is a prerequisite to filing a LUPA appeal. CP 278–79. Because LUPA

provides no mechanism for appealing the City's refusal to act on the application, there can be no preemption.[5]

Rather than acknowledge the obvious fact that Edmonds forced this lawsuit by refusing to issue a conditioned permit or denial (while threatening to expire the application), WSAMA blames Mr. Rimmer for not acceding to Edmonds' unconstitutional demand to secure an appealable permit decision. WSAMA Br. at 3, 10. But its criticism misses the mark. Mr. Rimmer cannot be required to accede to a taking in order to bring an unconstitutional conditions claim.[6] *Koontz*, 570 U.S. at 606–07; *see also Branch Banking & Tr. Co. v. Pac. Life Ins. Co.*,

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[5] It is black letter law, moreover, that Mr. Rimmer was not required to exhaust administrative and LUPA remedies before filing his § 1983 claim. *Knick v. Twp. of Scott*, 588 U.S. 180, 185, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) (holding that "exhaustion of state remedies is not a prerequisite" to a takings claim); *Pakdel*, 594 U.S. at 478 (holding that a § 1983 plaintiff does not need to exhaust administrative remedies).

[6] *Horne v. Dep't of Agric.*, 569 U.S. 513, 528, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013) (concluding that "it would make little sense to require the [owner to submit to a taking] in one proceeding and then turn around and sue [to reclaim the property] in another proceeding").

645 F. App'x 387, 392 (6th Cir. 2016) (a plaintiff is under no duty to capitulate to a wrongful demand merely to save the defendant from the consequences of its own error). Nor would satisfying the City's *condition precedent* have resulted in a final *conditioned* permit, as amicus suggests. Why would Edmonds reimpose the condition on the final permit if the terms of the tree replacement and protection plan already "exists in the permit file" and is incorporated into the recorded covenant? CP 35. Amicus' LUPA preemption argument is untethered from the facts of the case and should be disregarded.

2. Ripeness

WSAMA's ripeness argument also relies on the false premise that the tree condition "never materialized," and therefore refuses to address whether the condition that Edmonds imposed on the issuance of Mr. Rimmer's permit was sufficiently final to satisfy ripeness. That is fatal to amicus' objection. *Pakdel* controls the ripeness determination in this case (CP 97) by holding that an unconstitutional conditions claim "is ripe for

judicial resolution" once the government is committed to a position as to how its regulations apply to the application. 594 U.S. at 479. This "relatively modest" inquiry requires only a demonstration that "there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 478 (quotation modified).

There is no question here that the City was firmly committed to its position that Mr. Rimmer must record the tree covenant before it would issue a permit. CP 95; *see also* CP 273, 282–84. Indeed, throughout this litigation, the City has taken the firm position that its development code would not allow it to issue a permit without a recorded tree covenant, which "provides notice that a condition exists in the City's permit file." CP 35; Opening Br. at 5–7; *see also* CP 124 (City planner declaration stating that, per the City's code, applicants "must record a notice on title … prior to building permit issuance."). Thus, the trial court correctly concluded that Mr. Rimmer's claim was ripe for judicial review. CP 5.

3. Mootness

The City's decision to comply with the trial court's mandamus ruling by issuing the April 29, 2024, permit did not moot Mr. Rimmer's § 1983 claim for damages. WSAMA Br. at 12–13 (arguing that that Mr. Rimmer "got what he wanted" when he received the permit). Indeed, courts routinely hold that where a plaintiff seeks damages for past constitutional violations, subsequent policy changes or permit issuances do not moot the claim. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

II. THE BURDEN OF PROOF

The burden of proof is not a contested issue in this case. Opening Br. at 10–11 (stating that once the condition is shown to be an exaction, "the burden of proof shift[s] to the City to prove that the condition satisfies the nexus and rough proportionality tests"). Nor is there any basis for amicus' claim that legislatively mandated exactions are subject to a more

deferential standard of review. WSAMA Br. at 25. Just last year, the U.S. Supreme Court unanimously held that legislatively mandated exactions stand on "equal footing" with and are subject to the same "ordinary takings rules" as adjudicative exactions. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 276, 279, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024) ("[T]here is no basis for affording property rights less protection in the hands of legislators than administrators.").

III. MR. RIMMER SATISFIED THE PREDICATE TAKING INQUIRY

WSAMA's refusal to acknowledge the condition imposed on Mr. Rimmer's application undercuts its ability to address the trial court's predicate taking determination on the merits. Thus, instead of addressing the terms of the permit condition, amicus argues that a future tree condition would "involve[] no physical interest in land," and would require no conveyance of property to the City (or a third party). WSAMA Br. at 18; *see also* 14, 16–17, 19, 22–24, 26, 30, 33 (speculating about the terms of a condition that "would have" been imposed if the City had issued

a conditioned approval). Alternatively, amicus questions the U.S. Supreme Court's logic for holding government-compelled fixtures subject to its physical taking rule in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Neither argument has merit.

A. Edmonds' Tree Condition Sought Physical Interests in Mr. Rimmer's Property

Edmonds' tree condition demanded a physical interest in Mr. Rimmer's lot in three distinct ways: (1) that Mr. Rimmer install and maintain two City-mandated trees as "a permanent feature" of the property (RP 20; CP 190−91); (2) that he designate and set aside a portion of his property as a "tree protection area" where he (and all future owners) must allow the trees to mature unimpeded by any private use of the property (CP 165, 182);[7] and (3) that he acquire and plant two

[7] *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965) (a demand for a conservation area to protect environmental resources constitutes an exercise of eminent domain); *see also Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (A permit condition requiring the dedication of

replacement trees on his property, while reserving to the City "the right to control the use and disposition" of those trees (which are also real property under Washington law).[8] CP 113–15; Resp. Br. at 42–43. Each of those demands seeks to appropriate a physical interest in real property. *Koontz*, 570 U.S. at 599 (defining an exaction as a permit condition requiring the owner to "relinquish[ ] a portion of his property"); *id.* at 606 (an exaction is a permit condition demanding "that the applicant turn over property").

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a shoreline buffer "must satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*.") (cleaned up).

[8] *In re Machlied's Est.*, 60 Wn.2d 354, 360, 374 P.2d 164 (1962) (trees as real property until they are severed from the land, at which point they become personal property); *see also Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 30, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (applying physical taking rules to hold the government liable for a taking where its management of a dam resulted in the destruction of trees); 2 *Nichols on Eminent Domain* § 5.03 (2022) ("It does not matter whether the annexations were affixed by operation of nature, as in the case of trees, … or by artificial means, such as buildings, fences, or other structures. In both cases, if they are acquired by eminent domain, compensation must be paid to the owner.").

Indeed, Edmonds conceded the facts necessary to establish a physical taking at oral argument. *Loretto*, 458 U.S. at 437 ("whether a permanent physical occupation has occurred presents relatively few problems of proof"). The City acknowledged that its condition required Mr. Rimmer to allow the trees to remain as "a permanent feature" of the property, and as a result, the City conceded that condition was the functional equivalent of an ouster because it reduced Mr. Rimmer's right to use that portion of his property. RP 23 ("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."). "Once the fact of occupation is shown, of course … there is a taking." *Loretto*, 458 U.S. at 437–38; *see also id*. at 431 (A physical occupation effects a 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)).

That Edmonds would allow Mr. Rimmer to retain "ownership" of the land and the trees does not take his claim outside the purview of the physical taking rule. Where the government exercises physical dominion over property, it deprives the owner of his fundamental "right to control the[] disposition" of the property, and therefore effects a per se physical taking.[9] *Horne v. Department of Agriculture*, 576 U.S. 350, 363–64, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015). Trees, like raisins, "are private property—the fruit of the growers' labor—not public things subject to the absolute control of the state" (*id*. at 367); thus, a condition appropriating the right to control their use and disposition is a per se taking and satisfies

[9] In reaching this conclusion, the Court rejected the government's argument that a demand that leaves the owner with any rights of ownership must be analyzed under the multi-factorial (and substantially more deferential) regulatory taking test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123–24, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *Horne*, 576 U.S. at 363–64.

the predicate taking inquiry. *Id*. at 364–66 (citing *Nollan*, 483 U.S. at 834 n.2).

B. There Is No Requirement That an Owner Convey the Demanded Property to the Government (or a Third Party)

WSAMA's insistence that the City's note to title doesn't meet the definition of a "covenant" misses the point of Mr. Rimmer's argument (i.e., the note makes the condition permanent and binding against future owners) and misses the substance of the U.S. Supreme Court's takings law, which focuses on function and effect over form. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (in evaluating physical taking claims, the Court looks at the burden imposed on the owner, not "the nuances of state property law"). Even so, putting the dispute aside, WSAMA's insistence that the tree condition does not require him to convey title to the City (or a third party) has no bearing on whether a taking occurred.

The Supreme Court has repeatedly held that there is no requirement that an owner transfer title to the demanded property for the government to commit a physical taking. *See* Resp. Br at 48–49 (citing *Cedar Point*, 594 U.S. at 156; *Causby*, 328 U.S. at 262; *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16, 71 S. Ct. 670, 95 L. Ed. 809 (1951); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375, 65 S. Ct. 357, 89 L. Ed. 311 (1945)). That's because a taking must be determined based on the impact to the owner's rights "rather than the accretion of a right or interest to the sovereign." *Gen. Motors Corp.*, 323 U.S. at 378.

The fact that a third party owned the cable box at issue in *Loretto* simply shows *one way* in which the government can take a physical interest in property—but it does not create a categorical defense. Indeed, when interpreting caselaw, "it is a general rule that unless the Supreme Court expressly limits its opinion to the facts before it, it is the principle which controls and not the specific facts upon which the principle was decided." *United States v. LaBinia*, 614 F.2d 1207, 1210 (9th Cir. 1980)

(cleaned up, citation omitted). And when interpreting takings caselaw, the U.S. Supreme Court has admonished against reading the facts of any particular case to create a contextual (or categorical) defense to a taking. *Arkansas Game & Fish Comm'n*, 568 U.S. at 31 (noting "the nearly infinite variety of ways in which government actions or regulations can affect property interests").

C. The Tree Condition Is Distinguishable from Ordinary Fixtures Required by Regulation

Edmonds' tree condition is distinct from "the raft of commonplace requirements to retrofit property with, for example, accessible public restroom fixtures, labor law-related posters, smoke and carbon monoxide detectors, and kitchen grease traps," which are typically not subject to a physical taking analysis. WSAMA Br. at 20. Indeed, none of amicus' examples are analogous to the City's tree condition because they involve regulations that would allow the owner to decide where to put the object, whether to move it, replace it, sell it, etc. *Loretto*, 458 U.S. at 440 n.19. Here by contrast, once the trees are installed,

the City code provides that Edmonds will control all of those decisions "as clearly 'as if the Government held full title and ownership."' *Horne*, 576 U.S. at 364 (quoting *Loretto*, 458 U.S. at 331); *see also* Resp. Br. at 41–43. The distinction drawn by *Loretto* is simple: the physical taking rule will apply when the government retains control over the object that it requires to be affixed to the property. *Loretto*, 458 U.S. at 440; *see also Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 524, 217 P.3d 546 (2009).

IV. Amicus Cannot Cure the City's Failure to Establish Nexus and Proportionality

WSAMA's argument on the nexus and proportionality offers only the type of sweeping generalities that are disallowed by the heightened scrutiny nexus and proportionality tests. *Dolan*, 512 U.S. at 391.

For example, when addressing the nexus test, WSAMA offers only that the tree condition advances the social benefits of tree preservation. WSAMA Br. at 26–27. But the question whether a regulation advances a legitimate government objective

is a due process standard that has no place in the *Nollan/Dolan* analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *Nollan*, 483 U.S. at 841 (government's belief that exaction will serve public interest "does not establish that the [landowner] alone can be compelled to contribute to its realization"). Instead, the nexus test requires the government to show that the exaction is designed to mitigate the impacts of the proposed development "and not for other reasons." *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 825 (6th Cir. 2023) (government cannot constitutionally condition a permit to "give the public a benefit" that is unrelated to the development's impacts). And in making that showing, the government must demonstrate that it "is acting to further its stated purpose." *Sheetz*, 601 U.S. at 275.

WSAMA does not address the nexus standard because Edmonds' stated purpose for requiring the replacement trees was to ensure "the impacts on the ecological integrity caused by the development are *outweighed* by measures taken … 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). Because the City's stated purpose exceeds its authority under *Nollan/Dolan*, the City cannot establish a nexus.

But even if the Court was to look past the City's purpose, the only relevant evidence on record is the arborist report, which determined no impacts resulting from the removal of the dogwood tree. CP 182; *see also* Opening Br. at 39 (insisting that the arborist's report satisfied the City's duty to prepare a site-specific study of project impacts); CP 93 n.3 (same). Obviously, a determination of no impacts means that there can be no nexus.

WSAMA's proportionality argument fares no better. Finding no individualized proportionality determination in the record, amicus suggests that the City code's consideration of diameter *alone* will establish equivalency when determining the number of replacement trees needed to replace the functions of the removed tree. WSAMA Br. at 28 (citing David J. Nowak &

Tim Averermann, *Tree Compensation Rates: Compensating for the Loss of Future Tree Values*, 41 Urb. Forestry & Urb. Greening 93, 94–97 (2019)). But the cited article does not say what amicus wants it to. Instead, the article concludes that considering a tree's diameter is a "less appropriate" method for determining the number of replacements because diameter merely measures "past benefits already received," and does not compare the effect of its removal against the gains attributable to the new and growing replacement trees. Nowak, *supra*, at 94–97 (stating that an equivalency determination must consider tree size, leaf area, life span, and growth rate). Thus, according to the article, amicus *cannot* establish proportionality by simply observing the dogwood's diameter (at maturity) is larger than that of the replacement trees (as saplings).

WSAMA alternatively argues that proportionality can be indirectly established by showing that other municipalities

impose similar conditions on development.[10] Wrong. To establish proportionality, the City must make an "individualized determination" that the property demand "is related both in nature and extent *to the impact of the proposed development*." *Dolan*, 512 U.S. at 391 (emphasis added). Code provisions adopted by other cities make no such individualized determination and cannot satisfy the City's burden of establishing proportionality.

Even so, WSAMA's insistence that a 2:1 replacement requirement is "an accepted practice" is misleading because amicus cites code provisions that apply to different types of trees and development. WSAMA Br. at 28 (string cite). When the ordinances are reviewed for their application to a 13-inch non-native tree that must be removed for the development of a single-

[10] WSAMA provides no indication that the replacement requirements of any of the cited ordinances have been upheld against a *Nollan/Dolan* challenge. Thus, the ratios adopted by those ordinances cannot determine the constitutionality of Edmonds' demand.

family home, they reveal that the replacement requirements for regulated (non-landmark) trees vary from 0 to 3. And they do so in direct relation to the government's consideration of site-specific criteria, including the tree-specific factors listed in the Nowak article. *See* Nowak, *supra*, at 94–97.

Kirkland's tree ordinance, for example, imposes no mandatory replacement requirement on a project like Mr. Rimmer's proposed home; instead, the City will determine whether the owner must provide replacement trees based on a permit-by-permit basis that takes into consideration the species and age of the tree, its longevity, and its location on the property. Kirkland Zoning Code § 95.30. Meanwhile, Bellevue's tree code only requires a single replacement tree for the removal of a 13-inch dogwood, but provides that the replacement requirement can be offset with credits provided for any trees protected as part of his project (like the red cedars). Bellevue City Code § 20.20.900.E.4.b, E.6.d. Shoreline, on the other hand, adopted a mandatory schedule based solely on the tree's diameter and

would require three replacements for a single 13-inch dogwood. Shoreline Mun. Code § 20.50.360.C. Obviously, the different replacement ratios adopted by other municipalities speak to their very different approaches to the issue, arrive at different results, and cannot establish proportionality here.

CONCLUSION

Inherent in our constitutional system is a tension between individual liberty and governance for the general good. The doctrine of unconstitutional conditions strikes a balance between those often-competing interests by protecting individual property rights while upholding the government's authority to minimize the harms attributable to new development. *Koontz*, 570 U.S. at 605–06. As laudable as tree protection may be in general (and in other applications), Edmonds' tree condition crosses the constitutional line by demanding property in excess of the negligible impacts of Mr. Rimmer's proposal to remove a single, ornamental dogwood necessary to build his family home. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct.

158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."); *Dolan*, 512 U.S. at 396. The trial court's judgment should be affirmed.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the rules of this Court and contains 4,883 words.

DATED: October 17, 2025.

Respectfully submitted,

By: s/ *Brian T. Hodges*

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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: October 17, 2025.

s/ *Brian T. Hodges*
BRIAN T. HODGES, WSBA #31976

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