

HON. NICOLE GAINES PHELPS
Hearing Date: November 15, 2024
Time: 1:30 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

OOM LIVING, LLC, a Washington limited liability company; JENNIFER EGUSA WALDEN,

Plaintiffs,

v.

CITY OF SEATTLE, a Washington municipal corporation; SEATTLE PUBLIC UTILITIES,

Defendants.

Case No. 23-2-14374-4 SEA

**REPLY ON PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Seattle's municipal code is perfectly clear. SPU may demand a water main extension when there isn't a water main abutting the property.¹ But it can't do so when the property abuts a suitable main.² That makes perfect sense because, in the former circumstance, the development creates a need for new public infrastructure. What doesn't make sense, however, is the City's claim that SPU enjoys unfettered authority to withhold residential water service from a

¹ SMC 21.04.061.A, *available at* Rodabough Decl., App. A.

² SMC 21.04.050, *available at* Rodabough Decl., App. A.

1 property that abuts an existing water main unless she pays hundreds of thousands of dollars for
2 new public infrastructure that is not necessary to serve her property.

3 **CORRECTION TO CITY’S MISSTATEMENT OF FACTS**

4 The City’s opposition relies on the patently false claim that the water main extension
5 demanded by SPU is “necessary” to provide residential water service to Parcel Y.³ Not true.
6 The City offers no evidence of necessity. In fact, the City’s 2019 Water System Plan, which
7 identifies the City’s water system priorities and needs does not even identify a water main
8 extension in 39th Avenue SW as a City need.⁴ Likewise, the City agrees that (1) Parcel Y abuts a
9 suitable main under SW Elmgrove Street, (2) Oom Living could connect to that main with no
10 adverse impacts to the water system or other users, and (3) Oom Living’s proposed connection to
11 the existing water main satisfies the City’s published approval criteria without a water main
12 extension.⁵ Indeed, Parcel Y is currently receiving water service via a temporary connection to
13 the existing main under SW Elmgrove Street that can be converted to a permanent connection
14 with little effort.⁶

15 The City’s discussion of risks generally associated with long service lines is similarly
16 misleading.⁷ Again, the City offers no evidence that the expertly designed private service line
17 proposed by Oom Living poses any risk whatsoever. That is because SPU does not regulate the
18 design of private service lines and does not consider a line’s length when determining whether to
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20 ³ See, e.g., City Opp., at 11:12, 18:15, etc.

21 ⁴ Third Rodabough Decl., Ex. 19, at 130:23-25 & 132:8-11 (City Depo.).

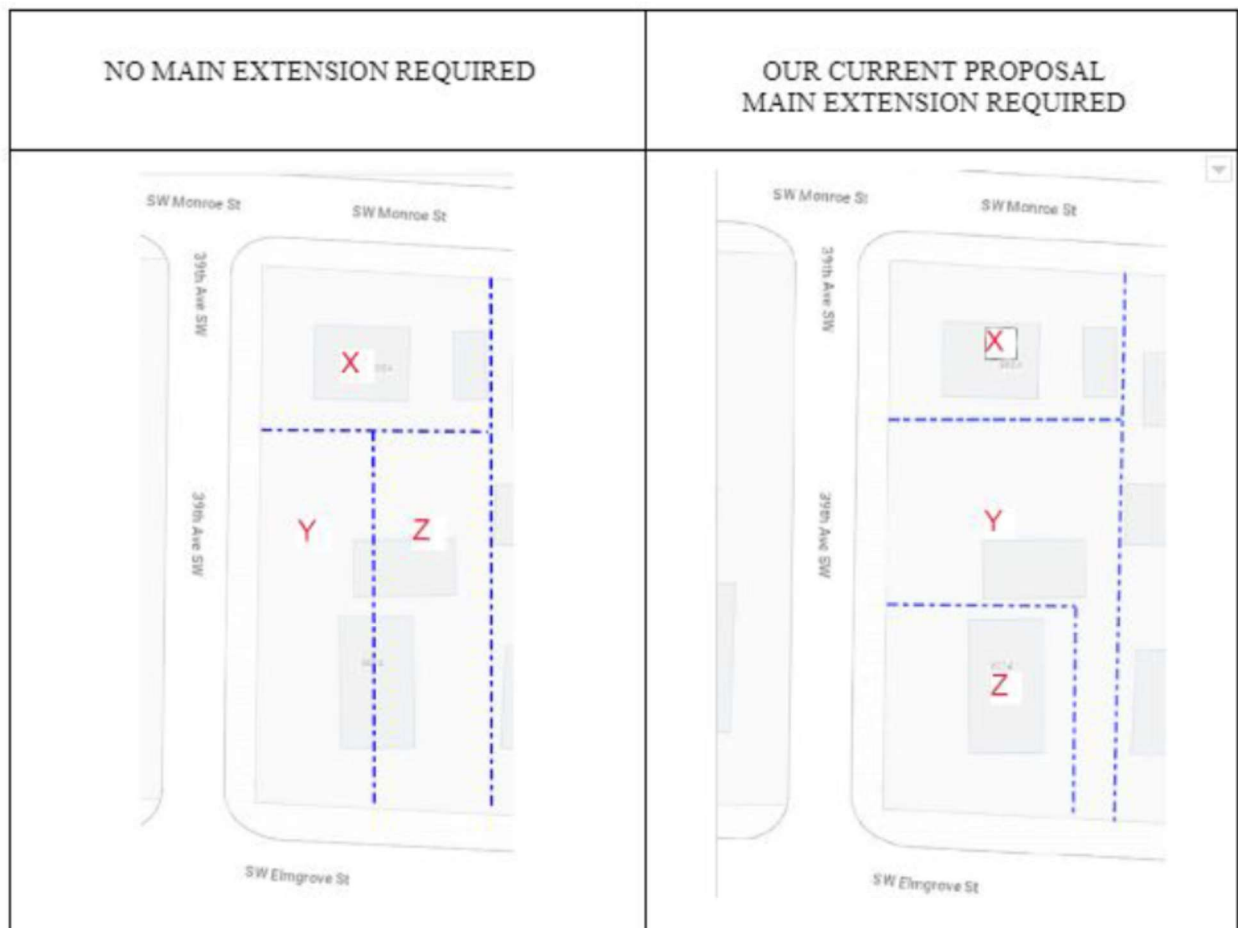
22 ⁵ Rodabough Decl., Ex. 2 at 76:11-20; see also City Opp., at 10:1-2 (conceding that criteria are met).

23 ⁶ Walden Decl., at ¶31.

⁷ Per KCLCR 56(e), Plaintiffs object to the “evidence” offered by the City at page 4, line 5 of its Opposition (citing “Eberle Declaration1, Exhibit D, p. 18-19”), as it does not constitute “expert” opinion. The City designated Jon Ford, P.E. as its only expert witness. The cited interrogatories were not signed by Jon Ford under oath and penalty of perjury.

1 approve, deny, or condition a WAC.⁸ Nor does SPU consider risk when reviewing an
2 application.⁹

3 Indeed, the City’s allegation that its regulations implicitly require the “shortest
4 perpendicular service from the main to their building” is contradicted by the testimony of SPU’s
5 Rule 30(b)(6) official who confirmed that the agency would have approved a service line of the
6 exact same length had Parcel Y been configured consistent with the following diagram on the
7 left:¹⁰



8 ⁸ Rodabough Decl., Ex. 2, at 42:15-18, 47:3-6, and 108:2-5 (City Depo.).

9 ⁹ Rodabough Decl., Ex. 2, at 42:15-18 (City Depo.).

10 ¹⁰ Second Rodabough Decl., Ex. 13, 102:4-13 (City Depo.), Ex. 17 (diagram); and Ex. 16 (WAC Director Level Determination Meeting Notes).

1 **ARGUMENT**

2 **A. SPU’s Refusal to Approve a Connection to an Abutting Water Main Violated the**
3 **Code**

4 Plaintiffs’ declaratory judgment claim is controlled by SMC 21.04.050, which states that
5 SPU “*shall* cause the premises described in the application, if the same abut upon a street in
6 which there is a City water main, to be connected with the City’s water main...”¹¹ The City
7 Council’s use of the word “shall” is an “imperative and operates to create a duty rather than
8 conferring discretion.”¹² Thus, Oom Living is entitled to connect to the abutting main in SW
9 Elmgrove Street.

10 The City tellingly does not cite this provision in any briefing and offers no reasoned
11 argument why it doesn’t control here.

12 Instead, the City asks the Court to interpret a different code provision, SMC 21.04.061.A,
13 to authorize SPU’s water main extension demand. But, per its plain terms, that provision applies
14 only to parcels “*not abutting* a street(s) in which there is a standard or suitable City distribution
15 water main.”¹³ Under the rules of statutory interpretation, the Court cannot add the phrase
16 “unless the property abuts the main via a flag lot” where the City Council did not do so.¹⁴

17 The City’s interpretation of Subsection VI.C.3.c of WTR-440 to authorize the exaction
18 similarly fails. Per its plain language, that subsection pertains only to “the installation
19 requirements under this rule *that would apply before the division.*”¹⁵ Here, SPU’s Rule 30(b)(6)
20

21 ¹¹ SMC 21.04.050 *available at* Rodabough Decl., App. A (emphasis added).

22 ¹² *State v. Bartholomew*, 104 Wn.2d 844, 848 (1985).

23 ¹³ *City Opp.*, at 6-7, 11-14 (citing SMC 61.04.061.A).

¹⁴ *State v. Freeman*, 124 Wn. App. 413, 415 (2004).

¹⁵ *City Opp.*, at 8-13 (citing subsection VI.C.3.c of WTR-440).

1 official testified that there was no water main extension requirement on Oom Living’s properties
2 before they were subdivided.¹⁶ Thus, per the rule’s express limitation, it does not apply here.

3 The City’s express appeal to the “spirit”¹⁷ of the agency rule and/or the City Council’s
4 unspoken intent—an intent that is contrary to the published code—are irrelevant. These
5 provisions are unambiguous as to their application. Unless the City Council amends chapter
6 21.04 SMC, SPU’s desire to prohibit water connections via a lawful lot configurations cannot be
7 accomplished via rulemaking fiat.

8 **B. SPU’s Water Main Extension Condition is Subject to *Nollan/Dolan***

9 The City does not contest that the water main extension condition fails the *Nollan/Dolan*
10 nexus and proportionality tests (and as incorporated into RCW 82.02.020).¹⁸ Instead, the City
11 presses the truly extraordinary claim that SPU—a municipal agency—is not subject to the
12 ordinary limitations imposed on all government bodies by the federal constitution.¹⁹ The City’s
13 argument is baseless.

14 The U.S. Supreme Court has held that the doctrine applies “[w]hen the government
15 conditions the grant of a benefit such as a permit, license, or registration,”²⁰ upon a requirement
16 that the owner “spend money to improve public lands.”²¹ No rule limits the doctrine’s
17 application to only those permit conditions purporting to mitigate a development’s impacts—the
18 doctrine also protects against unrelated, excessive, and/or coercive demands, such as

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¹⁶ Rodabough Decl., Ex. 2, at 62:7-16 (City Depo.).

20 ¹⁷ City Opp., at 24:16.

¹⁸ City Mot., at 15-21.

21 ¹⁹ City Opp., at 15-18. *But see Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 279 (2024) (“there is no basis
22 for affording property rights less protection in the hands of legislators than administrators”); *Cedar Point Nursery v.*
Hassid, 594 U.S. 139, 149 (2021) (holding all government actions impairing property subject to the Fifth
23 Amendment regardless of whether it comes garbed as a regulation, statute, ordinance, or miscellaneous decree).

²⁰ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 161 (2021).

²¹ *Id.* at 619.

1 conditioning a permit upon a requirement that the owner “allows the commission to host its
2 annual holiday party in her backyard ... [or agrees to] bankroll[] the party at a local pub instead
3 of hosting it on her land.”²² Thus, far from relieving SPU of its constitutional burden, the fact it
4 required costly public infrastructure improvements without regard to the development’s impacts
5 on the public water system demands application of the nexus and proportionality tests.

6 The City’s attempt to distinguish *Anderson Creek Partners, L.P.* is baseless.²³ The City
7 quotes from a section of the opinion where the Court explained that ordinary user fees (*i.e.*, a
8 monthly water bill or a generally applicable fee to tap into the existing water system) are not
9 subject to *Nollan/Dolan*. That is a non-sequitur. Neither this case nor *Anderson Creek* involves
10 a user fee. Instead, as *Anderson Creek* held, a condition requiring the applicant to “offset the
11 costs to expand water ... systems to accommodate development” is not a user fee, it is an
12 exaction subject to *Nollan* and *Dolan*.²⁴

13 Even if this Court considered the City’s false narrative that the extension is “necessary”
14 to provide water service to Parcel Y, that claim provides no basis for avoiding SPU’s
15 constitutional duty under *Nollan* and *Dolan*. That is because, even if an infrastructure
16 improvement is necessitated by, or may benefit, a development, the demand must still be
17 proportionate to the development’s impacts.²⁵ Thus, in *Dolan*, the U.S. Supreme Court
18 concluded that a permit condition requiring a store owner to build a bicycle/pedestrian trail failed
19 the proportionality test even though the owner’s proposed expansion caused the need for new
20

21
22 ²² *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 275 (2024)

23 ²³ *City Opp.*, at 17-18 (quoting *Anderson Creek*, 382 N.C. 1, 39 (N.C. 2022)).

24 ²⁴ *Anderson Creek*, 382 N.C. at 17.

25 ²⁵ *Dolan*, 512 U.S. at 391.

1 traffic infrastructure and the store would directly benefit from it.²⁶

2 The City’s hyperfocus on the benefits the exaction may provide to Parcel Y is not
3 relevant to whether the doctrine applies. Oom Living, after all, applied for a government
4 benefit—residential water service. And although Parcel Y abutted an existing main, SPU used
5 its power to withhold water and force Oom Living to build new infrastructure that would provide
6 the same benefit as connecting to the main under SW Elmgrove Street. The doctrine clearly
7 applies.

8 Throughout the administrative proceedings, moreover, the City insisted that the extension
9 is intended to provide public benefits, such as orderly gridding and better water service to future
10 development. And during the Rule 30(b)(6) deposition, the SPU official testified that, if Oom
11 Living installed the extension, the City would provide a free service hookup to a neighboring
12 property located across the street.²⁷ In this way, the exaction in this case is wholly unlike those
13 at issue in the *Blueprint* decision (requiring extension where property did not abut a water main)
14 and the unpublished appellate decision, *Entel v. Asotin County*, 30 Wash. App. 2d 1038 (2024)
15 (requiring a fire service road to connect a remote property to public right-of-way).

16 **C. SPU’s Water Main Extension Condition is Subject to RCW 82.02.020**

17 Seattle’s opposition brief offers no new argument for avoiding RCW 82.02.020 or 42
18 U.S.C. §1983. Thus, in the interest of judicial economy, Plaintiffs incorporate the arguments
19 presented in response to the City’s cross-motion.

20 **CONCLUSION**

21 Plaintiffs respectfully request that the Court grant its Motion for Partial Summary
22

23 ²⁶ *Dolan*, 512 U.S. at 378.


²⁷ Second Rodabough Decl., Ex. 13, at 145:3-9 (City Depo.).

1 Judgment and deny the City's cross-motion. A proposed Order is attached hereto as Appendix
2 A.

3 Dated: November 12, 2024

4 The undersigned certify that this memorandum contains less than 1,750 words in
5 compliance with the Local Civil Rules.

6 LAW OFFICE OF SAMUEL A. RODABOUGH PLLC PACIFIC LEGAL FOUNDATION

7 
8 _____
9 Samuel A. Rodabough, WSBA #35347
Attorney for Plaintiffs

s/ Brian T. Hodges

Brian T. Hodges, WSBA #31976
Attorney for Plaintiffs

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1 **DECLARATION OF SERVICE**

2 I, Samuel A. Rodabough, declare under penalty of perjury under the laws of the State of
3 Washington that the foregoing is true and correct:

4 On November 12, 2024, I caused the foregoing document and accompanying Third
5 Declaration of Samuel A. Rodabough to be served on the individuals listed below in the manner
6 indicated:

7 **Attorneys for Defendants**

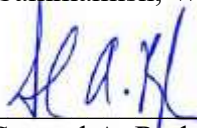
8 Andrew C. Eberle
9 Seattle City Attorney’s Office
701 5th Ave., Ste. 2050
Seattle, WA 98104-9097

- Hand Delivery
- First Class U.S. Mail
- E-mail: Andrew.Eberle@seattle.gov
- Other: KC Script Portal

10 Jacob P. Freeman, WSBA #54123
11 Fennemore Craig, P.C.
1425 Fourth Ave., Ste. 800
12 Seattle, WA 98101-2272

- Hand Delivery
- First Class U.S. Mail
- E-mail: jfreeman@fennemorelaw.com
- Other: KC Script Portal

13 Executed this 12th day of November, 2024 at Sammamish, Washington.

14 
15 _____
16 Samuel A. Rodabough

APPENDIX A

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SUPERIOR COURT OF WASHINGTON
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CITY OF SEATTLE, a Washington municipal corporation; SEATTLE PUBLIC UTILITIES,

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Case No. 23-2-14374-4 SEA

[Proposed]

**ORDER GRANTING PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on cross motions for summary judgment, specifically Plaintiffs’ Motion for Partial Summary Judgment (“Plaintiffs’ Motion”) and The City of Seattle’s Motion for Summary Judgment, both filed October 18, 2024. The Court considered the following pleadings and evidence:

1. Plaintiffs’ Motion for Partial Summary Judgment (Dkt. #78);
2. Declaration of Jennifer Egusa Walden Re: Plaintiffs’ Motion for Partial Summary Judgment (Dkt. #79);
3. Declaration of Samuel A. Rodabough Re: Plaintiffs’ Motion for Partial Summary

1 Judgment (Dkt. #80);

2 4. The City of Seattle's Motion for Summary Judgment (Dkt. #81);

3 5. Declaration of Andrew C. Eberle In Support of the City of Seattle's Motion for Summary
4 Judgment (Dkt. #82);

5 6. The City's Opposition to Plaintiffs' Motion for Partial Summary Judgment (Dkt. #84);

6 7. Second Declaration of Andrew C. Eberle In Support of the City of Seattle's Opposition
7 to Plaintiffs' Motion for Partial Summary Judgment (Dkt. #85);

8 8. Plaintiffs' Opposition to City of Seattle's Motion for Summary Judgment (Dkt. #87);

9 9. Second Declaration of Samuel A. Rodabough Re: Plaintiffs' Motion for Partial Summary
10 Judgment (Dkt. #88);

11 10. The City of Seattle's Reply in Support of its Motion for Summary Judgment (Dkt. #91);

12 11. Declaration of Andrew C. Eberle in Support of the City of Seattle's Reply in
13 Support of Its Motion for Summary Judgment (Dkt. #90);

14 12. Reply on Plaintiffs' Motion For Partial Summary Judgment (Dkt. #92); and

15 13. Third Declaration of Samuel A. Rodabough Re: Plaintiffs' Motion for Partial Summary
16 Judgment (Dkt. #93).

17 Having considered the Motions, the oral arguments of counsel, and the other pleadings,
18 filings, and evidence in this matter, and being fully advised, the Court finds that there are no
19 genuine issue of material fact precluding entry of summary judgment in this case and therefore,
20 it is hereby ordered:

21 Plaintiffs' Motion for Partial Summary Judgment is GRANTED:

22 1. Plaintiffs' claim for declaratory judgment is granted as follows:

- 23 a. The City's conditioning of the Water Availability Certificate violated the plain language of Chapter 21.04 SMC and/or SPU Director's Rule WTR-440. To the extent the City interprets subsection VI.C.3.c of WTR-440 to authorize the water main extension condition, its interpretation of that subsection conflicts with the City code and does not follow from the subsection's plain language.

- 1
- 2 b. To the extent that SPU has adopted an unwritten policy of prohibiting
- 3 private service line connections to an abutting water main via a legally
- 4 established flag lot configuration, its application of that unwritten
- 5 policy to Oom Living's application for a water availability certificate
- 6 was arbitrary and capricious.
- 7
- 8 c. The City's water main extension constitutes a fee or charge on
- 9 development subject to RCW 82.02.020. The City has failed to meet
- 10 its burden of showing that the extension was "reasonably necessary as
- 11 a direct result of the proposed development or plat to which the
- 12 dedication of land or easement is to apply." Thus, the condition
- 13 violates RCW 82.02.020.
- 14
- 15 d. The City is enjoined from enforcing the water main extension
- 16 condition and is directed to issue a water availability certificate
- 17 approving Plaintiffs connection to the abutting water main under SW
- 18 Elmgrove Street.

19 2. Plaintiff's claim for liability under 42 U.S.C. § 1983 is granted as follows:

- 20
- 21 a. The City's demand that Plaintiffs fund the design and installation of a
- 22 water main extension as a condition of issuing a water availability
- 23 certificate is an exaction subject to *Nollan v. California Coastal*
- Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374
- (1994), and *Koontz v. St. Johns River Water Management District*, 570
- U.S. 595 (2013).
- b. The City has not met its burden of demonstrating that the condition
- bears an essential nexus or is roughly proportionate to the impacts of
- Plaintiffs' proposed connection to the abutting water main under SW
- Elmgrove Street. Thus, the condition violates the federal doctrine of
- unconstitutional conditions.
- c. Plaintiffs suffered a cognizable constitutional injury the moment the
- City imposed the unconstitutional condition on the water availability
- certificate.
- d. The City was acting under the color of state law when it placed the
- water main extension condition on Plaintiffs' water availability
- certificate.
- e. The City is liable for damages under 42 U.S.C. § 1983, the amount of
- which to be proven at trial.


1 The City of Seattle's Motion for Summary Judgment is DENIED.

2 Done in open court this ____ day of November, 2024.

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4
5 HONORABLE NICOLE GAINES PHELPS
King County Superior Court

6 Presented by:

7 LAW OFFICE OF SAMUEL A. RODABOUGH PLLC

8 
9 Samuel A. Rodabough, WSBA #35347
Attorney for Plaintiffs

10
11 PACIFIC LEGAL FOUNDATION

12 s/ Brian T. Hodges
13 Brian T. Hodges, WSBA #31976
Attorney for Plaintiffs

14
15 Agreed as to form; Notice of presentation waived:

16 ANN DAVISON
Seattle City Attorney

17
18 Andrew C. Eberle, WSBA #51790
19 *Attorneys for Defendants*