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

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

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| OOM LIVING, LLC, a Washington limited liability company; JENNIFER EGUSA WALDEN,<br>Plaintiffs,<br>v.<br>CITY OF SEATTLE, a Washington municipal corporation; SEATTLE PUBLIC UTILITIES,<br>Defendants. | Case No. 23-2-14374-4 SEA<br>**PLAINTIFFS' OPPOSITION TO CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT** |

## I.
## RELIEF REQUESTED

The City's Motion for Summary Judgment ("Motion") asks this court to conclude that the City has otherwise limitless and unchecked authority to demand private property owners to construct public infrastructure—here, a water main extension—as a condition of connecting to the City's water system. Specifically, the Motion argues that the City isn't bound by the doctrine of unconstitutional conditions as established by the U.S. Supreme Court in *Nollan* and *Dolan*.[1]

[1] City Mot., at 15-21. *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).



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As previously briefed in Plaintiffs' Motion for Partial Summary Judgment, within the land use context, these doctrines prevent government from conditioning a permit approval on a public dedication of private property (*i.e.*, an "exaction")—including a requirement to expend money for public purposes—unless the government first shows that its demand bears an "essential nexus" and is "roughly proportional" to an identified, adverse impact of the property's proposed use.[2] Similarly, the City's Motion asserts that it isn't bound by chapter RCW 82.02 RCW, which is Washington's statutory codification of *Nollan* and *Dolan*.[3]

Oom Living seeks to construct a custom residence and ADU on Parcel Y—a parcel abutting SW Elmgrove Street and its existing water main.[4] However, as a condition of connecting to the City's water system, the City demands that Oom Living construct a public water main extension in 39th Avenue SW at an estimated cost of $355,000,[5] as opposed to connecting to the main in SW Elmgrove Street at a cost of $8,000.[6]

The City has violated the essential nexus requirement of *Nollan*, as the City concedes that Oom Living's proposal to connect to the water main in SW Elmgrove Street would have no adverse, public impact:

> **Q. Is there any adverse public impact if there were to be a connection from Parcel Y to the water main in Southwest Elmgrove Street?**
>
> **A. No.**[7]

Moreover, the City violates the "rough proportionality" requirement of *Dolan* by conceding that the cost of the demanded water main extension is irrelevant to its decision to

[2] Plfs' Mot., at 22 (citing *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138 (2019)).
[3] City Mot., at 8-15.
[4] Walden Decl. at ¶3.
[5] Walden Decl., at ¶23; Rodabough Decl., Ex. 2, at 118:13-17 (City Depo.).
[6] Walden Decl., at ¶32.
[7] Rodabough Decl., Ex. 2, at 95:24-25 to 96:1-2 (City Depo).



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impose the condition. Indeed, the City brazenly testified that it has the authority to require private property owners to construct and finance public infrastructure costing millions:

> Q. There is no point at which the cost of that water main extension becomes so exorbitant to you that it is unreasonable to place that burden on a single property owner?
>
> A. I have no policy or anything that directs me to consider that.
>
> ...
>
> Q. Okay. What if it were half a million? Would that be considered?
>
> **A. Well, I already said that I don't consider it, so it doesn't matter if it's a dollar or 10 million.**[8]

The City's position is untenable and contrary to applicable law. It also highlights why the doctrine of unconstitutional conditions, and its statutory codification in chapter 82.02 RCW, is necessary to protect vulnerable property owners from being extorted by government agencies in exchange for land use and permitting approvals.

Plaintiffs respectfully request that the Court deny the City's Motion for Summary Judgment and grant Plaintiffs' Motion for Partial Summary Judgment.

## II.
## STATEMENT OF FACTS

To avoid duplication, and for the convenience of the Court, Plaintiffs adopt and hereby incorporate by reference, the Statement of Facts as contained in Plaintiffs' Motion for Partial Summary Judgment. Additionally, Plaintiffs offer the following rebuttal to the City's Statement of Facts:

### 1. Growth Management Act Versus State Building Code

The City expressly refers to RCW 19.27.097(1)(a) as being contained in the "Growth

[8] Rodabough Decl., Ex. 2, at 99:17-25 to 100:1-3 (City Depo).



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Management Act" ("GMA")[9] This is false. The GMA is codified in chapter 36.70A RCW and imposes its own requirements on cities to plan for infrastructure.[10] Plaintiffs speculate that this represents a typographical error by the City but, out of an abundance of caution, note the error nonetheless. The error is significant, however, as the City, in an apparent attempt to avoid applicability of the doctrine of unconstitutional conditions, characterizes a Water Availability Certificate ("WAC") as unrelated Oom Living's right to build a residence and ADU. However, RCW 19.27.097(1)(a) is actually contained in the State Building Code—a tacit admission that WACs are directly related to the building permit process.

**2. A Suitable Water Main Exits in SW Elmgrove Street**

Next, the City alleges that Oom Living is required to construct a water main "across the frontage of its property [on 39th Avenue SW] because the street it fronts, SW Elmgrove Street, contains no existing water main."[11] This is false. All evidence in this case confirms that there is a water main contained in SW Elmgrove Street.[12] Again, Plaintiffs surmise that this represents a typographical error by the City but, out of an abundance of caution, note the error nonetheless.

3. **Both SDCI and SPU Are Governed by the Seattle Municipal Code**

Next the City observes that "[Seattle Public Utilities] operates independently of the Seattle Department of Construction and Inspection, which administers the City's land use regulations and permitting authority."[13] Although technically accurate, this statement is designed to downplay the City's egregious behavior, in which SDCI encouraged Oom Living to design Parcel Y as a flag lot, and then SPU subsequently claimed that the existence of the flag lot

[9] City Mot., at 2:13.
[10] Chapter 36.70A RCW.
[11] City Mot., at 2:16-18.
[12] *See* Rodabough Decl., Ex. 2, at 20:6-16 (City Depo).
[13] City Mot., at 19-21.



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was evidence that Oom Living was making an end-run around water main extension requirements.[14] Regardless of how the City is organized, it is only governed by a single, unified Seattle Municipal Code that binds both agencies. The City Code, for example, does not define the term "lot" one way for purposes of subdividing property (*i.e.*, a function of SDCI) and another for purposes of utilities installation (*i.e.*, a function of SPU). Under the Seattle Municipal Code, a property owner either has a legal "lot," which may include a flag lot, or they do not. The City cannot excuse its egregious behavior by simply claiming that one hand doesn't know what the other hand is doing.

**4. The City Doesn't Regulate the Length of Private Service Lines**

Next, the City presents a narrative about the alleged perils of "long" private service lines."[15] This, too, is incorrect. In its CR 30(b)(6) deposition, the City testified that for purposes of granting, denying, or conditioning a WAC, the City does not take the length of Oom Living's proposed private service line into consideration:

> **A. As I've said multiple times, private service lines are not approved or disapproved by the Water Availability Certificate. Only the connection to our system is approved or disapproved.**[16]

Moreover, the City concedes that it does not regulate the length of private service lines:

> **Q. Okay. And at what point in length [of a private service line] does the City determine that the risk is so high that the design must be denied?**
>
> **A. We don't have a standard for that.** [17]
>
> **...**
>
> **Q. Then are you aware of anything in city code that limits -- that otherwise limits the length of a private service line?**

[14] Walden Decl., at ¶7.
[15] City Mot., at 3:1-13.
[16] Rodabough Decl., Ex. 2, at 108:2-5 (City Depo.).
[17] City Depo. Trans, at 42:15-18



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**A. No."**[18]

Inasmuch as the City concedes that 1) approval of private service lines is not a function of the WAC approval process, and 2) the City's doesn't regulate or otherwise limit the length of private service lines, the City's narrative in its Statement of Facts about the risks of longer private connection lines is legally irrelevant. Instead, the narrative appears to be included as a post hoc justification for the City's imposition of the water main extension condition.

**D. The Benefit to the Property Owner of the Water Main Extension**

Next, the City asserts that the WAC condition is appropriate because the water main extension would benefit Parcel Y. However, as extensively briefed herein, any such observations are irrelevant to the legal issues presented. Under *Nollan*, for example, the proper inquiry is whether there is any adverse impact of the property's proposed use, not whether there might be some remote benefit to the property owner.[19]

**E. A Potential Latecomer's Agreement Does Not Save the City's Unconstitutional Condition.**

Finally, the City attempts to justify its WAC condition by asserting that the property owner could possible recoup some of the $355,000 cost of constructing the water main extension via a latecomer's agreement.[20] For obvious reasons, the possibility of a future payment by a third-party, would not excuse the City's unconstitutional condition.

Even so, the City misspeaks. There are only three lots on the west side of 39th Avenue SW in the vicinity of the demanded water main extension, which are depicted as follows:[21]

[18] City Depo. Trans, at 47:3-6.
[19] *Supra*, at 2.
[20] City's Mot. 5:6 (citing RCW 35.91.020).
[21] Second Rodabough Decl., Ex. 15 (Water Diagram).



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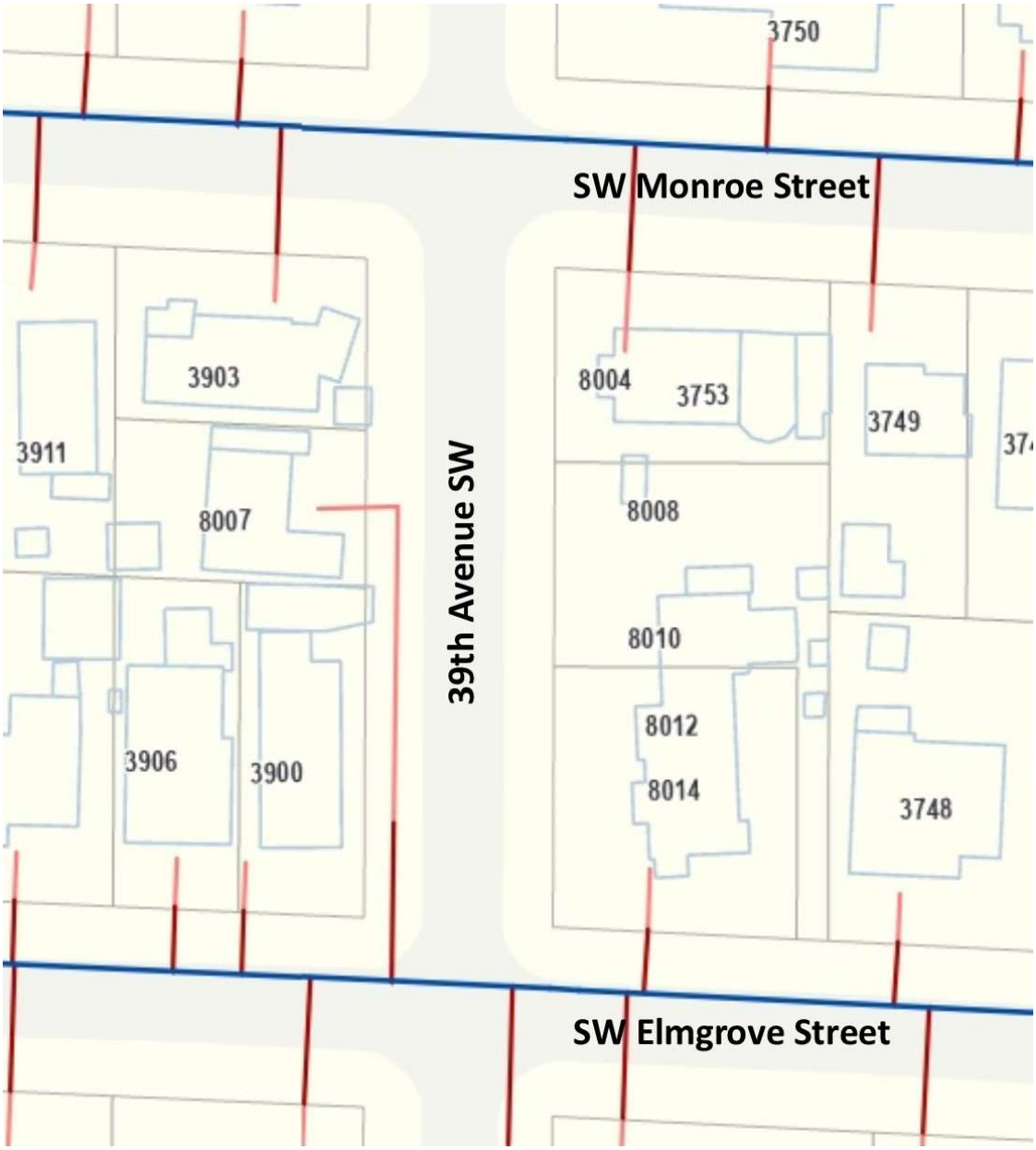


Per the diagram, 3903 is already connected to the water main in SW Monroe Street. Moreover, any new main in 39th Avenue SW will not be located within the frontage of 3903, as Oom Living has only been required to construct it to the northernmost boundary of Lot Y, (referenced above as 8008).[22] Likewise, 3900 is already connected to the main in SW Elmgrove

[22] Rodabough Decl., Ex. 5 (WAC).



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Street.[23] In short, the only parcel with a realistic possibility of connecting to a new main in 39th Avenue SW is 8007 (which is currently connected to the main in SW Elmgrove Street).[24] However, the City admitted in its CR 30(b)(6) deposition that it would allow 8007 to connect to the new main without having to pay anything to Oom Living under any latecomer's agreement:

> **Q. Okay. And so it is your testimony that based on past practice from the City, if Oom Living LLC were to construct the demanded water main extension in 39th Avenue Southwest, the City would then connect house 8007 to it without any compensation to Oom Living LLC?**
>
> **A. Yes. As far as I understand how the latecomer process works, that's correct.**[25]

In short, the City has admitted that it would allow 8007 to connect for free without paying for any latecomer's agreement, making the potential for any recovery for Oom Living quite remote.

Moreover, 3903, 8007, and 3900 are all zoned Neighborhood Residential3 (NR3),[26] in which the minimum lot size is 5,000 square feet.[27] These lots are 4,366 square feet, 4,000 square feet, and 4,181 square feet respectively.[28] In short, they cannot be subdivided any further.

## III.
## STATEMENT OF ISSUES

Plaintiffs respond the Statement of Issues as presented in the City's Cross-Motion as follows:

1. Should the Developer's declaratory judgment act claim be dismissed because it cannot show that the City's water availability certificate decision violates RCW 82.02.020?

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[23] Second Rodabough Decl., Ex. 15 (Water Diagram).
[24] *Id.*
[25] Second Rodabough Decl., Ex. 13, at 145:3-9 (City Depo).
[26] Second Rodabough Decl., Ex. 14 (Assessor's Data).
[27] SMC 23.44.010.A., *available at* Second Rodabough Decl., App. B.
[28] Second Rodabough Decl., Ex. 14 (Assessor's Data).



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Answer: **No.**

2. Should the Developer's Section 1983 claim be dismissed because the City's water main extension requirement is not an exaction subject to *Nollan*/*Dolan's* unconstitutional conditions doctrine?

Answer: **No.**

3. Should the Developer's declaratory judgment act claim be dismissed because prohibiting developers from connecting to its water system via flag lot configurations does not violate state or City statutes, rules, or regulations?

Answer: **No.**

## IV.
## EVIDENCE RELIED UPON

This Motion is based upon the following pleadings, filings, and/or evidence:

1. Plaintiffs' Opposition to City of Seattle's Motion for Summary Judgment;
2. Plaintiffs' Motion for Partial Summary Judgment, including portions therein adopted by reference in Plaintiffs' Opposition to City of Seattle's Motion for Summary Judgment;
3. Declaration of Jennifer Egusa Walden;
4. Declaration of Samuel A. Rodabough, including exhibits attached thereto; and.
5. Second Declaration of Samuel A. Rodabough including exhibits attached thereto.

## V.
## LEGAL AUTHORITY

### A. Standard of Review

Per CR 56, a moving party is entitled to entry of summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[29] Because this case arises within the context of the City's permitting process, the

[29] CR 56(c).



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material facts are predominantly established by the record of that process. Thus, nothing prevents this Court from entering judgment as a matter of law. For brevity, counsel assumes that the Court is intimately familiar with the standards applicable to Motions under CR 56 and does not reiterate them here. As explained in greater detail herein, the City's Motion for Summary Judgment should be denied.

**B. SPU's Decision Violated City Code and State Law**

Seattle does not contest that Oom Living's application to connect a private service line to the abutting main under SW Elmgrove Street satisfied all *published* Code criteria for approval.[30]

Indeed, Seattle's Motion for summary judgment fails to cite a single published policy, rule, code, or statute prohibiting water line connections via a flag lot. That is because there is none. Flag lots are legal lot configurations and are often used (indeed, encouraged) to connect residences to public utilities.[31]

Instead, Seattle insists that SPU has adopted an *unwritten* policy of reading section VI.C.3.c of Director's Rule WTR-440 to impose such an outright ban—even though that subsection speaks to a different topic and makes no mention of flags lots. SPU's decision to deny Oom Living a water connection based on an unwritten agency policy is the definition of an arbitrary and capricious decision—particularly here where the published rules and codes entitle Oom Living to the proposed connection to the abutting water main under SW Elmgrove Street.[32] The decision, furthermore, violates the city code and published agency rules. Seattle's Motion seeking dismissal of Oom Living's declaratory judgment claim should be rejected.

**1. The City Code Entitles Oom Living to its Proposed Water Connection**

[30] Rodabough Decl., Ex. 2, at 76:11-20 (City Depo.).
[31] Rodabough Decl., Ex. 2, at 23:3-8 (City Depo.).
[32] *Anderson v. City of Issaquah*, 70 Wn. App. 64, 81 (1993).



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State law requires that a water availability determination "must assure that ... water is both factually and legally available."[33] The City has admitted that Lot Y abuts a suitable water main under SW Elmgrove Street, establishing that, as a matter of fact, the proposed connection to the abutting water main is available.[34] Thus, the only question is whether the connection is legal available.

Chapter 21.04 of the Seattle Municipal Code sets forth the standards for determining whether the proposed connection is legally available. Per SMC 21.04.050, upon application and payment of the appropriate fee, the City "***shall*** cause the premises described in the application, ***if the same abut upon a street in which there is a City water main, to be connected with the City's water main.***"[35] And per SMC 21.04.061.A, a main extension may only be required when a parcel does "not abut[] a street[] in which there is a standard or suitable City distribution water main to the extent of the parcel boundary."[36] Nothing in Seattle's municipal code says, *unless the frontage is via a flag lot*.

Nor is there anything in SPU's published agency rules and policies that says that either. SPU Director's Rule WTR-440 purports to "establish [SPU's] requirements to receive water service."[37] Seattle fails to discuss Section VIII.A.3, which sets forth the criteria for when a water main extension is ***not*** required, stating:

> A water main extension is not required when one parcel:
>
> (a) Has a boundary with a standard or suitable water main along the full extent of that boundary; and

[33] *Fox v. Skagit Cnty.*, 193 Wn. App. 254, 262–63 (2016) (citation omitted).
[34] Rodabough Decl., Ex. 2, at 50:18-20 (City Depo.).
[35] SMC 21.04.050, *available at* Rodabough Decl., App. A (emphasis added).
[36] SMC 21.04.061.A, *available at* Rodabough Decl., App. A (emphasis added).
[37] Rodabough Decl., Ex. 1, at § I (SPU Director's Rule WTR-440).



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(b) One boundary contains a standard distribution or suitable water main along the full extent of the boundary; and

(c) A single water service is required.[38]

The uncontested facts establish that Oom Living's proposal meets each of these conditions: (a) Parcel Y has a boundary along SW Elmgrove Street, which contains a standard or suitable water main along the full extent of Parcel Y's boundary[39]; (b) SW Elmgrove Street contains a standard distribution or suitable water main along the full extent of Parcel Y's boundary;[40] and (c) Parcel Y is the only parcel in this project that requires new water service, as the other two parcels—Parcels X and Z—already have connections.[41] Thus, Oom Living satisfied all of SPU's published criteria for when a water main extension is not required.

Instead of addressing these published criteria, Seattle argues that Subsection VI.C.3.c of WTR-440 overrides all other rule provisions by outright (and *silently*) prohibiting residences from connecting to an abutting water main via a flag lot.[42] But the subsection does not say that. Instead, the subsection prohibits property owners from using "division, redivision, or lot boundary adjustment of land" to avoid SPU's water main extension requirements.[43] Indeed, Seattle overlooks that the rule contains the critically limiting language that the reconfiguration "shall not change the installation requirements under this rule ***that would apply before*** the division, redivision, or lot boundary adjustment."[44] That is because that limiting clause is fatal to its argument.

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[38] Rodabough Decl., Ex. 1, at §VIII.A.3 (SPU Director's Rule WTR-440, § I).
[39] Rodabough Decl., Ex. 2, at 113:9-12.
[40] *Id.* at 50:18-20.
[41] Rodabough Decl., Ex. 2, at 52:14-25.
[42] City Mot., at 23-25.
[43] Rodabough Decl., Ex. 1, at § VI.C.3.c (SPU Director's Rule WTR-440, § I).
[44] *Id.* (emphasis added).



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SPU's Rule 30(b)(6) official admitted that there was no water main extension requirement in place before Oom Living subdivided the property into three lots.[45] Thus, per its own limiting terms, subsection VI.C.3.c does not apply.

Seattle's insistence that the Court should simply defer to the "spirit" of the rule and declare all contrary code and rule provisions ambiguous is baseless.[46] SPU's authority to interpret City code provisions does not allow it to adopt an unwritten policy that substantively depart from the published criteria set out by the city code and agency rules.[47] The City, moreover, is not entitled to deference where its interpretation is offered for the purpose of the current litigation.[48] Here, the City's Motion offers no evidence of an SPU policy of prohibiting connections via flag lots, nor does Seattle allege that SPU's interpretation of local codes to forbid flag lots is a function of a "pattern of past enforcement" by the City, rather than a "by-product of the current litigation."[49] Its failure to meet this burden in its opening brief is determinative against its claim for deference here.

### C. SPU's Authority to Demand Public Infrastructure as a Condition of a WAC Approval is Limited by Constitutional and Statutory of Nexus and Proportionality Requirements

SPU's authority to demand that a WAC applicant pay to improve the public water system is limited by ordinary notions of fairness that are written into the "essential nexus" and "rough proportionality" tests established by the U.S. Supreme Court in *Nollan v. California Coastal Commission*[50] and *Dolan v. City of Tigard,*[51] and later refined in *Koontz v. St. Johns River Water*

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[45] Rodabough Decl., Ex. 2, at 62:7-16 (City Depo.).
[46] City Mot., at 24-25.
[47] *Tuerck v. Dep't. of Licensing,* 123 Wn.2d 120 (1994).
[48] *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47 (2007).
[49] *Id*.
[50] *Nollan*, 483 U.S. 825.
[51] *Dolan*, 512 U.S. 374.



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*Management District*.[52] These tests, which are also incorporated into RCW 82.02.020, stand for the principle that government may not use its monopoly power over the provision of such things as residential water to coerce an applicant into paying for new infrastructure that is neither necessitated by nor proportionate to the public impacts of the proposed development.[53]

**1. SPU's Water Main Extension Demand Seeks a Dedication of Private Property and is Subject to the Doctrine of Unconstitutional Conditions**

Seattle does not defend SPU's water main extension demand on the merits of the nexus and proportionality tests. Indeed, it cannot do so because it has admitted that Oom Living's proposed water connection to the main under SW Elmgrove Street will have no adverse impacts on the existing water system or other users.[54] And the City has additionally admitted that, as a matter of agency policy, it made the water main extension demand without any regard to proportionality.

> Q. Okay. Now, proportionality is a term that we frequently use...to refer to a doctrine of unconstitutional conditions. Sometimes it's referred to as -- by its case names of *Nollan* and *Dolan*, and other times it's referred to the principles of nexus and rough proportionality. Do any of those -- are any of those references familiar to you?
>
> A. Yes. They have been discussed.
>
> ...
>
> Q. And is it also correct that if these issues will not be considered at a manager-level review or a director-level review, they also aren't considered as part of the original adjudication of the Water Availability Certificate; is that correct?
>
> A. That is correct.[55]

[52] *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).
[53] *Id.* at 604-06.
[54] *Walden Decl., at ¶25. See also* Rodabough Decl., Ex. 6 (Eberle Letter) and Ex 2, at 96:3-16 (City Depo.).
[55] Rodabough Decl., Ex. 2, at 91:2-20.



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Thus, having no defense on the merits, the City claims that, as a matter of law, the unconstitutional-conditions doctrine cannot be applied to the conditioned WAC. Wrong. There is absolutely nothing in precedential caselaw supporting the City's desire for a rule that would categorically exempt a water connection approval from the doctrine's nexus and proportionality requirements. And contrary to the City's claim, demands to fund public infrastructure improvements have always been held subject to the doctrine. The City's motion must, therefore, be rejected.

**a. SPU's conditioned WAC is unquestionably among the types of discretionary government approvals that are subject to *Nollan* and *Dolan*.**

The City argues that the unconstitutional-conditions doctrine applies only narrowly to certain types of land-use approvals, urging the Court to rule that a conditioned water availability certificate is categorically excluded from the doctrine's application.[56] Seattle's argument is baseless. Indeed, the City does not cite a single precedential decision supporting such a rule.[57] That is because there is none.

According to the U.S. Supreme Court, the doctrine applies broadly "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration,"[58] upon a requirement that the owner "spend money to improve public lands," the demand will constitute a "monetary exaction,"[59] and "must satisfy the requirements of *Nollan* and *Dolan*."[60] That is because "government may not require a person to give up the constitutional right ... to receive just compensation when property is taken for a public use … in exchange for a discretionary

[56] City Mot., at 17-17.
[57] *Id*.
[58] *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 161 (2021).
[59] *Koontz*, 570 U.S., at 608.
[60] *Id*. at 619.



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benefit [that] has little or no relationship to the property."[61] Similarly stated in *Koontz*, "[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."[62]

A building permit is just one example of a "government benefit" that is subject to *Nollan* and *Dolan* in the land use context. *See Dolan*, 512 U.S. at 377 (doctrine applied to conditioned building permit); *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 272 (2024) (same). Contrary to the City's claim that the *Nollan/Dolan/Koontz* doctrine applies only to final building permits[63] courts routinely apply to doctrine to preliminary approvals in the land-use context. *See*, *e.g.*, *Nollan v. California Coastal Com.*, 177 Cal. App. 3d 719, 721, 223 Cal. Rptr. 28 (Ct. App. 1986) (demolition permit), *rev'd* 483 U.S. 825; *Koontz*, 570 U.S. at 601 (clear and grade permit); *see also*, *e.g.*, *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 688 (2002) (preliminary plat approval); *Sparks v. Douglas Cnty.*, 127 Wn.2d 901, 904 (1995) (short plat).

Thus, it is unsurprising that courts—including the King County Superior Court[64]—have applied the *Nollan/Dolan* doctrine to conditions imposed on water hookup approvals. *See Anderson Creek*, 876 S.E.2d at 504; *see also Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (recognizing that a water hookup decision may violate *Nollan*, depending on the facts of the case); *abrogated on other grounds by Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 548, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Indeed, the City fails to disclose that in *Pioneer Square Hotel Co. v. City of Seattle*, King County Superior Court Judge McHale issued a preliminary

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[61] *Cedar Point Nursery*, 594 U.S. at 161; *see also See Dolan*, 512 U.S. at 385.
[62] 570 U.S. at 606.
[63] Seattle X-Mtn. SJ at 17.
[64] *See* Second Rodabough Decl., Ex. 18 (attaching Judge McHale's June 21, 2019, Order Granting Plaintiff's Motion for Preliminary Injunction in *Pioneer Square Hotel Co. v. City of Seattle*, King County Superior Court No. 19-2-14886-1 SEA).



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injunction upon concluding that the property owner would likely prevail in its unconstitutional-conditions challenge to a similarly conditioned water availability certificate.[65]

Seattle does not address these numerous precedential decisions. Instead, the City hinges its argument on a nonprecedential[66] trial court opinion to argue that, as a matter of law, the *Nollan/Dolan* doctrine applies only to building permits.[67] Respectfully, the trial court's conclusion that *Nollan* and *Dolan* apply only to permit decisions that "forbid construction" or "condition construction" is clear error.[68] Even so, it is false for the City to assert that SPU is not demanding a water main extension in exchange for Oom Living's owner's right to build. Per state law, the City will not issue Oom Living's building and occupancy permits without an approved WAC.[69]

The conditioned WAC is clearly a discretionary government benefit and is subject to the doctrine of unconstitutional conditions.

**b. The Water Main Demand is an Exaction Subject to the Nexus and Proportionality Standards**

SPU's demand that Oom Living pay to design and install a new water main extension, then dedicate it to the City, is unquestionably an exaction subject to the nexus and proportionality requirements. As stated above, the U.S. Supreme Court has held that a condition

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[65] *See* Second Rodabough Decl., Ex. 18.

[66] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008) ("trial court rulings are not precedential")

[67] City Mot., at 17 (citing Eberle Decl., Ex. A at 13-14 (*Blueprint Capital Services, LLC v. City of Seattle*, King County Superior Court Case No. 18-2-17033-8 SEA (LUPA Order, June 7, 2019)).

[68] *See*, *e.g.*, *Cedar Point*, 594 U.S. at 161. And even so, the *Blueprint* ruling is of limited value here because it was issued in a LUPA proceeding under a statutory standard of review that is very deferential to the government action, and it furthermore involved a property *that did not abut an existing water main*, as is the case here.

[69] RCW 19.27.097; *see also Cedar Point*, 594 U.S. at 162 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection."). *See also* Rodabough Decl., Ex. 2, at 12:13-25 to 13:1-20 (City Depo.); and Rodabough Decl., Ex. 1, at 4 definition of "Water Availability Certificate ("A WAC is required for most development projects in Seattle.") (SPU Director's Rule WTR-440).



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requiring an owner to "spend money to improve public lands" is a "monetary exaction" and must, therefore, "satisfy the requirements of *Nollan* and *Dolan*."[70]

The *Blueprint* decision, once again, is wrong. Indeed, the trial court misunderstood the facts of *Koontz*. *Koontz* did not involve a condition that gave the owner a choice between "conveying an interest in their property, or paying an equivalent fee, or being denied permission to develop their property."[71] Instead, *Koontz* involved a "non-land-use monetary condition" requiring that the owner spend money to improve public lands (*i.e.*, repair ditches and install culverts on public lands), which was imposed "in the absence of a compelled dedication of land."[72] To be clear, 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."[73] Thus, there is no meaningful distinction between the condition in *Koontz* and this case.

Seattle's alterative claim that, as a matter of law, the doctrine does not apply if the burdened property owner derives any benefit from the demanded infrastructure fundamentally misunderstands takings law.[74] The fact that a property owner may benefit from an unconstitutional demand to fund infrastructure improvements does not make the act lawful. The U.S. Supreme Court has long held that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking … of private property for public use without compensation."[75]

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[70] *Koontz*, 570 U.S. at 608, 619.
[71] City Mot., at 20 (summarizing *Blueprint*).
[72] *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So.3d 396, 397–98 (Fla.Ct.App.5th Dist. 2014).
[73] *See also St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So.3d 8, 12 (Fla. Dist. Ct. App. 2009).
[74] City Mot., at 16-19.
[75] *Village of Norwood v. Baker,* 172 U.S. 269, 279 (1898); *see also Bauman v. Ross*, 167 U.S. 548, 584 (1897) (special benefits accruing from a taking may be considered when determining the amount of just compensation due for a taking); *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1086 (N.D. Cal. 2014) (that a condition



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Indeed, the U.S. Supreme Court specifically noted that the permit conditions invalidated in *Nollan* and *Dolan* could have benefitted the burdened owners. *See Dolan*, 512 U.S. at 378 (demand for a pedestrian path alongside a store); *Nollan*, 483 U.S. at 856 (demand to open private beach to public) (Brennan, J., dissenting). Thus, exactions caselaw is replete with infrastructure demands that may benefit the burdened owner as well as the public, including park fees,[76] sidewalk fees,[77] tree fees,[78] or traffic improvement fees[79]—all of which could benefit the burdened development.

Seattle also claims that SPU's water main condition should escape constitutional scrutiny because it is an application for a public benefit (*i.e.*, tapping into the water system), not an application seeking permission to exercise a purely private development right.[80] Again, the City is wrong. As stated above, the doctrine applies when the government conditions a "discretionary benefit" on the surrender of a constitutional right.[81] Thus, the U.S. Supreme Court's unconstitutional conditions caselaw is replete with cases in which individuals applied for government benefits, such as unemployment benefits, tax exemptions, or permission to use highways.[82] And in *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, the North Carolina Supreme Court held conditions imposed on approvals to hook up to public water and sewer

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provides private benefits is not a defense to *Nollan/Dolan*), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017).

[76] *Trimen Development Co. v. King County*, 124 Wn.2d 261, 264 (1994) (park fee).

[77] *See*, *e.g.*, *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138 (2019) (sidewalk fee);

[78] *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 205-08 (6th Cir. 2021) (tree fee);

[79] *B.A.M. Dev., L.L.C. v. Salt Lake County*, 282 P.3d 41, 45-46 (Utah 2012) (traffic impact fee);

[80] City Mot. at 20-21.

[81] *Dolan*, 512 U.S. at 385.

[82] *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).



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systems subject to *Nollan* and *Dolan*.[83] There is simply no basis in precedent to categorically exempt the conditioned WAC from the doctrine's nexus and proportionality requirements.

**2. SPU's Water Main Extension Condition is Subject to, and Violates, Chapter 82.02.020 RCW.**

**a. Granting Partial Summary Judgment to Plaintiffs Does NOT Require Applying Chapter 82.02 RCW**

RCW 82.02 provides an alternative ground that incorporates the principles of *Nollan* and *Dolan*. Because Plaintiffs seek damages under Section 1983, it is only necessary for the Court address this claim if it were to find *Nollan* and *Dolan* inapplicable—they are applicable.

**b. Chapter 82.02 RCW Also Applies to the Conditioned WAC**

Enacted to as part of a tradeoff that granted local governments new authority to impose additional sales and real estate taxes, RCW 82.02.020 imposed a prohibition on local government's growing reliance on permit fees as a tool for funding public programs and facilities.[84] As a result, RCW 82.02.020 forbids local governments and their agencies from imposing "any tax, fee, or charge, either direct or indirect," such as a permit condition requiring that the applicant fund new public infrastructure, unless government can demonstrate that the exaction is "reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply."[85] In this way, the statute limits the City's authority to impose water "system charges" to "the proportionate share of such utility or system's capital costs" that the City "can demonstrate are attributable to the property being

[83] 382 N.C. 1, 876 S.E.2d 476, 489, 504 (N.C. 2022).
[84] *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 406–407 (1989); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006).
[85] *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 656-57 (2008).



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charged."[86] An unrelated or disproportionate exaction is invalid "unless it falls within one of the exceptions specified in the statute."[87]

Here, Seattle argues that SPU's decision falls within the statute's exemption for utility system charges imposed under an authority that pre-existed enactment of chapter 82.02 RCW. But the City cannot meet its burden that SPU's exaction meets the pre-existing authority exception to RCW 82.02.020.[88]

c. **SPU's Exaction Was Not Expressly Authorized by a Preexisting Statute**

The City has not met its burden of proving that SPU's exaction is exempt from RCW 82.02.020. To do so, the City is required to demonstrate that the agency's demand that Oom Living fund the installation of a water main extension as a condition of receiving a WAC derived from SMC 21.04.061(A), which in turn derived from RCW 35.92.035 (which preexisted Chapter 82.02 RCW).[89] But the City offers no analysis supporting its claim. That is because it cannot do so.

Per its plain terms, the City Code expressly states that SPU "***shall*** cause the premises described in the application, ***if the same abut upon a street in which there is a City water main***, to be connected with the City's water main by a service pipe extending at right angles from the main to the property line," with certain nonapplicable exceptions defined by ordinance.[90] Indeed, the City code only authorizes SPU to demand installation of a water main extension when the property does not "abut[] a street(s) in which there is a standard or suitable City

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[86] RCW 82.02.020; *see also* RCW 82.02.050 (authorizing impact fees on new development but limiting them to the proportionate share of costs of system improvements that are reasonably related to and reasonably benefit the development)

[87] *Citizens Alliance for Property Rights*, 145 Wn. App. at 657.

[88] *Home Builders Ass'n of Kitsap Cnty. v. City of Bainbridge Island*, 137 Wn. App. 338, 348 (2007).

[89] *See Trimen Dev. Co. v. King Cnty.*, 124 Wn.2d 261, 269 (1994) (holding park fees subject to RCW 82.02.020 where the earlier-enacted enabling ordinance did not specifically authorize the exaction).

[90] SMC 21.04.050, *available at* Rodabough Decl., App. A (emphasis added).



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distribution water main."[91] Thus, the City's claim for an exemption must fail at the first step of the analysis.

Even so, the City cannot meet its burden of demonstrating that SPU's exaction was authorized by RCW 35.92.035 either. That is because, once again, the statute does not authorize local government to exact infrastructure improvements on an ad hoc, application-by-application basis. Instead, per its plain terms, the statute only authorizes the City to establish reasonable charges for connecting to municipal water lines ***via legislation***:

> [Cities] are authorized to charge property owners seeking to connect to the water or sewerage system of the city or town as a condition to granting the right to so connect, in addition to the cost of such connection, **such reasonable connection charge as the legislative body of the city or town shall determine proper in order that such property owners shall bear their equitable share of the cost of such system**.[92]

Thus, Division I of Washington's Court of Appeals has construed this provision to authorize the adoption of reasonable, legislative fee schedules based on "the equitable share of property owners as a class."[93]

Unsurprisingly, the decisions cited in the City's Motion for the proposition that decisions made under RCW 35.92.025 are not subject to RCW 82.02.020 all involved challenges to connection fees imposed on a class of development pursuant to a legislatively enacted fee schedule. For example, in *Westridge-Issaquah*[94] and *Tapps Brewing, Inc. v. City of Sumner*[95] the court rejected challenges to "general facilities charges" imposed on property owners based on a legislatively-enacted formula. Likewise, *Prisk v. City of Poulsbo*[96] rejected a challenge to

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[91] SMC 21.04.061(A), *available at* Rodabough Decl., App. A (emphasis added)..
[92] RCW 35.92.025 (emphasis added).
[93] *Westridge-Issaquah II LP v. City of Issaquah*, 20 Wn. App. 2d 344, 368 (2021).
[94] 20 Wn. App. 2d at 370.
[95] 106 Wn. App. 79 (2001).
[96] 46 Wn. App. 793, 804 (1987)



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"utility connection fees" which were uniform "rates" set pursuant to local ordinance. Here, SPU did not charge Oom Living a connection fee pursuant to a rate schedule established by local ordinance—instead, it used its permitting monopoly to force Oom Living to build a public water main in the public right of way that is not needed to serve Oom Living's needs and is disproportionate to its impacts on the public water supply (none). Thus, SPU was not acting under authority delegated by this statute when it conditioned Oom Living's WAC on a requirement that it fund and install a new water main extension. And it cannot, therefore, shield its exaction from the nexus and proportionality requirements of RCW 82.02.020.[97]

**d. A Demand for New Public Infrastructure is an Indirect Fee or Charge on Development**

In yet another attempt to avoid the statute's nexus and proportionality requirements, the City claims that SPU's demand is not an indirect tax, fee, or charge on new development.[98] That claim, too, is baseless. Indeed, on pages 9-11 of its Motion, the City insists that the demand is in fact a "charge" on development. Indeed, SPU claims that its authority to exact the water main extension was derived from a State statute authorizing cities to establish fees to connect to municipal water lines.[99] The City cannot credibly argue that the exaction is a fee or charge in one breath, then disclaim it in the next.[100] Nor can it credibly do so where the City bears the burden of proof and it has chosen not to address the large body of caselaw holding that permit conditions requiring an applicant to pay for improvements to public infrastructure or land are indirect fees or charges subject to chapter 82.02 RCW. *See*, *e.g.*, *City of Fed. Way v. Town &*

[97] *Trimen Dev. Co. v. King Cnty.*, 124 Wn.2d 261, 269, 877 P.2d 187 (1994) (holding park fees subject to RCW 82.02.020 where the earlier-enacted enabling ordinance did not specifically authorize the exaction).
[98] City Mot., at 11-15.
[99] *Id*.
[100] *Id.* at 11-15.



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*Country Real Est., LLC*, 161 Wash. App. 17, 52 (2011) (fee earmarked for traffic infrastructure improvements); *Vintage Const. Co. v. City of Bothell*, 135 Wn.2d 833, 835 (1998) (park fee); *Trimen Dev. Co. v. King Cnty.*, 124 Wn.2d 261, 264 (1994) (open space fee); *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 603 (1992) (recreational facility fee).

Because the City has conceded that the exaction is an indirect fee or charge, SPU's demand must be held subject to RCW 82.02.020. It is unnecessary, therefore, for the Court to engage with the City's argument that the exaction is not an indirect tax on development: "Although the ordinance is not a tax, it is nevertheless subject to RCW 82.02.020 if it comprises a fee or charge."[101]

**e. The City Has Offered no Argument on the Reasonably Necessary and Proportionality Requirements of RCW 82.02.020**

The City cannot meet its burden of showing that the water main extension condition complied with RCW 82.02.020 on the merits. The "burden of establishing that a condition is reasonably necessary as a direct result of the proposed development is on the City"[102] Likewise, RCW 82.02.020 requires "strict compliance."[103] The City, however, offers no argument on either inquiry. That is because the City has admitted that SPU did not make the required individualized determination when it imposed the water main extenuation condition;

> **Q. ...Did you make any individualized determination about the proposed public impacts of connecting Parcel Y to the water main within Southwest Elmgrove Street?**
>
> **A. No...**[104]

[101] *View Ridge*, 67 Wn. App. at 598.
[102] *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755-56 (2002).
[103] *Citizens Alliance for Property Rights*, 145 Wn. App. at 657.
[104] Rodabough Decl., Ex. 2, at 96:12-15.



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SPU's Rule 30(b)(6) official testified that Oom Living's proposal to connect to the water main under SW Elmgrove Street would have no adverse public impact:

> **Q. Is there any adverse public impact if there were to be a connection from Parcel Y to the water main in Southwest Elmgrove Street?**
>
> **A. No.**[105]

Indeed, the City's policies expressly prohibit the City from considering nexus and proportionality when adjudicating WACs: "Other reasons [for challenging a water availability certificate] will be rejected, including **proportionality**..."[106] And the City concedes that Oom Living's proposal to connect to the water main under SW Elmgrove Street would have no adverse public impact:

> **Q. Is there any adverse public impact if there were to be a connection from Parcel Y to the water main in Southwest Elmgrove Street?**
>
> **A. No.**[107]

And SPU, moreover, admitted that it demanded the water main extension without regard to proportionality:

> Q. Okay. Now, proportionality is a term that we frequently use...to refer to a doctrine of unconstitutional conditions. Sometimes it's referred to as -- by its case names of *Nollan* and *Dolan*, and other times it's referred to the principles of nexus and rough proportionality. Do any of those -- are any of those references familiar to you?
>
> A. Yes. They have been discussed.
>
> ...
>
> Q. And is it also correct that if these issues will not be considered at a manager-level review or a director-level review, they also aren't considered as part of the original adjudication of the Water Availability Certificate; is that correct?

[105] Rodabough Decl., Ex. 2, at 95:24-25 to 96:1-2.

[106] Rodabough Decl., Ex. 7, at ¶E (SPU Director's Rule ENG-430).

[107] Rodabough Decl., Ex. 2, at 95:24-25 to 96:1-2.



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A. That is correct.[108]

**f. Judge Rogoff's Nonprecedential LUPA Decision Has No Bearing on the Issues in This Case**

Instead of addressing on-point precedential decisions, Seattle bases much of its argument for an exception to RCW 82.02.020 on the trial court's LUPA decision in *Blueprint Capital Services, LLC v. City of Seattle*.[109] But that decision is nonprecedential and cannot create the bright line rule that Seattle desires: "trial court rulings are not precedential."[110] Nor is the decision even applicable to the facts and issues presented by this case.

*Blueprint* involved very different facts, a different agency policy, a different provision of the City code, and a different provision of Chapter 35.92 RCW. Indeed, the development at issue in *Blueprint* did not abut an existing water main.[111] Instead, the developers in that case had applied for permission to install a private service line that would snake through the public right-of-way in order to connect to a main under a non-adjacent street.[112] Although SPU had historically approved so-called "spaghetti lines," SPU had adopted a published policy disallowing them.[113] As a result, SPU denied the developer's application for a WAC and stated that it would only approve a water connection if the developer agreed to fund and install a water main extension per its new agency policy.[114]

The developer challenged the water main extension condition on several grounds, including RCW 82.02.020. SPU defended its condition on the grounds that it was applying a

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[108] Rodabough Decl., Ex. 2, at 91:2-20 (City Depo.).
[109] *See* City Mot., at 10-11 (citing King County Superior Court Case No. 18-2-17033-8 SEA (LUPA Order, June 7, 2019) (attached as Ex. A to Eberle Dec. Ex. A).
[110] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248 (2008).
[111] *Blueprint* at 2-3, 10.
[112] *Id*.
[113] *Id*. at 2-3.
[114] *Id*. at 2.



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published policy that was specifically authorized by a pre-existing authority and was, therefore, exempt from RCW 82.02.020. The trial court agreed because the policy was consistent with SMC 21.04.061(B), which specifically granted the agency authority to demand a water main extension when the property does NOT abut an existing main.[115] And the trial court, thereafter, concluded that the City's authority to regulate water connections was, in turn, delegated from the State by operation of RCW 35.92.010.[116] Thus, the trial court concluded that a demand for a water main extension *in that circumstance* qualified for the pre-existing authority exemption.[117]

The *Blueprint* decision, however, does not address any of the agency rules or policies, City code provisions, or statutory provisions at issue here. Thus, the *Blueprint* decision has no bearing on the City's claim for an exemption in this case.

**3. Seattle Offers No Defense to Oom Living's 42 U.S.C. § 1983 Claim**

Seattle's Motion offers no defense to Oom Living's federal civil rights claim under 42 U.S.C. § 1983. That is because, if this Court finds a violation of the *Nollan/Dolan*, there is no defense. A property owner suffers a cognizable injury to her federal constitutional rights the moment the government conditions issuance of a land use approval upon an unconstitutional demand.[118] And as set out in Plaintiffs' Motion for Partial Summary Judgment, the City has admitted that SPU was acting under color of state law.[119] Thus, Seattle does not dispute that both elements of Oom Living's § 1983 action are satisfied.[120]

## V.
## CONCLUSION

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[115] *Blueprint* at 8.
[116] *Blueprint* at 8.
[117] *Blueprint* at 10.
[118] *Koontz* 570 U.S. at 607 (an owner suffers a cognizable constitutional injury)
[119] Rodabough Decl., Ex. 12 (City's Answers to Interrogatories).
[120] *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 11 (1992);[120] *see also Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1107 (9th Cir. 2022) (same).



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For the foregoing reasons, Plaintiffs respectfully request the Court deny the City's Motion for Summary Judgment and grant Plaintiffs' Motion for Partial Summary Judgment.

Dated: November 4, 2024

The undersigned certify that this memorandum contains less than 8,400 words in compliance with the Local Civil Rules.

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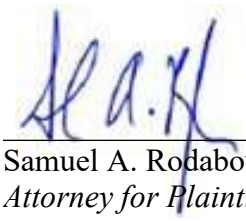

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**DECLARATION OF SERVICE**

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

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

**Attorneys for Defendants**

| | |
|---|---|
| Andrew C. Eberle<br>Seattle City Attorney's Office<br>701 5th Ave., Ste. 2050<br>Seattle, WA 98104-9097 | ☐ Hand Delivery<br>☐ First Class U.S. Mail<br>☒ E-mail: Andrew.Eberle@seattle.gov<br>☒ Other: King County E-Service |
| Jacob P. Freeman, WSBA #54123<br>Fennemore Craig, P.C.<br>1425 Fourth Ave., Ste. 800<br>Seattle, WA 98101-2272 | ☐ Hand Delivery<br>☐ First Class U.S. Mail<br>☒ E-mail: jfreeman@fennemorelaw.com<br>☒ Other: King County E-Service |

Executed this 4th day of November, 2024 at Sammamish, Washington.

Samuel A. Rodabough



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