Case No: 88426-3-I

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

Oom Living, LLC, and Jennifer Egusa Walden,

Respondents,

v.

City of Seattle and Seattle Public Utilities,

Appellants.

On appeal of an order of the King County Superior Court,
Case No. 23-2-14374-4 SEA

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Other Authorities

INTRODUCTION

Seattle Public Utilities' (SPU) demand that Respondents Oom Living, LLC and Jennifer Egusa Walden (collectively, "Oom Living") install and dedicate a water main extension that is not necessary to provide water service to the property is a textbook example of arbitrary, unlawful, and unconstitutional agency adjudication. Oom Living's application to connect the residence on Lot Y to the abutting water main in SW Elmgrove Street satisfied all published criteria for an approved Water Availability Certificate (WAC). *See* SMC 21.04.050 (mandating that SPU "shall" approve a connection where the property "abut[s] upon a street in which there is a City water main"); SPU Director's Rule WTR-440, § VIII.A.3 (setting out criteria for approval).

Despite that statutory imperative, SPU denied the proposed connection according to a previously undisclosed and unpublished agency "policy [that] a flag-lot doesn't count as frontage." CP 771–72. And following that policy, SPU instead

conditioned issuance of an approved WAC on a requirement that Oom Living pay hundreds of thousands of dollars to provide new public infrastructure. Opening Br. at 11.

SPU's dislike for flag-lots has no bearing on Oom Living's statutory right to connect its residence to the abutting main—let alone its constitutional right to develop its property free from excessive permit conditions. Flag-lots are legal in Seattle and are commonly used to accommodate utilities and to provide access. Indeed, the flag-lot at issue in this case was encouraged and approved by Seattle's Department of Construction & Inspections (SDCI), which is the agency that regulates lot configurations. To the extent SPU wants to create rules to implement the City's published code, the agency must do so through the formal rulemaking or policy-making process and make those standards available to the public in advance of adjudicating an application. SMC 3.02.070.B.

The superior court correctly ruled that SPU's water main extension requirement was unlawful on multiple independent

grounds. First, it violated the plain language of the municipal code and agency rules requiring SPU to approve a connection to the abutting water main. Second, SPU's decision to deny the proposed connection under an unpublished agency policy, rather than the published criteria for approval, was arbitrary and capricious. Third, the extension condition violated RCW 82.02.020 because SPU could not show that it was reasonably related to any impacts of the proposed development. And fourth, SPU leveraged its authority to withhold water in order to coerce Oom Living into spending hundreds of thousands of dollars to make unrelated and excessive improvements to public infrastructure in violation of the "essential nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

For these reasons, Oom Living respectfully requests that the Court affirm the trial court's judgment. And because the City

has stipulated that an affirmance will establish its liability for depriving Oom Living of its civil rights under 42 U.S.C § 1983 (CP 18), this Court should award Oom Living attorneys' fees on appeal pursuant to 42 U.S.C. § 1988.

RESPONSE TO SEATTLE'S UNSUPPORTED ASSERTIONS OF FACT

Seattle's appeal relies on three patently false statements of fact. First, the City claims that the demanded water main extension was *necessary to provide water service to Lot Y*. Opening Br. at 1–2, 24–25, 27, 31. Second, it claims that SPU was "[f]ollowing its policy against flag pole lot connections" when it denied the proposed water connection. *Id*. at 11, 49. And third, the City claims that the condition merely imposed a general monetary obligation and did not require a dedication of property. *Id*. at 18, 22–25, 27, 32–33. None of those assertions are supported by citation to the agency's record. RAP 10.3(a)(5) ("Reference to the record must be included for each factual statement."). This Court should disregard all arguments based on those unsupported facts. *Cowiche Canyon Conservancy v.*

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (a claim that is unsupported by reference to the record will not be considered).

1. The SPU Director's July 13, 2023, review decision is the final agency decision in this case and confirms that the extension was demanded for a very different purpose than Seattle claims on appeal. CP 801–05. The Director determined only that "the water main extension is necessary for orderly extension and efficient gridding of the water system." CP 804. The only findings pertaining specifically to the residence on Lot Y merely observed that the owner may enjoy some incidental benefits due to newer pipes and updated valves. CP 798. Despite Oom Living's repeated objection that the extension was not necessary to service the property, SPU made no finding that it was necessary to do so. CP 41, 45–46, 58–59, 64–66. Seattle's claims to the contrary should be disregarded.

2. Seattle's claim that SPU had adopted an official "policy against flag pole lot connections" is also unsupported by the agency record. Opening Br. at 11, 49. Per the municipal code,

agency rules, policies, and interpretations must be published and provided to the public. SMC 3.02.070.B. Yet, there is no "flag-lot" policy on agency's "Policies & Director's Rules" website.[1] Nor was such a policy mentioned in the Director's final decision. CP 801–05. That's because there is no such official policy. Indeed, when asked to produce documentation of *any policies* relied on by SPU when issuing its decision, Seattle responded that "[t]here are no non-privileged, non-work product, responsive documents." CP 1018–19.

That is precisely why the trial court concluded: "[t]o the extent that SPU has adopted an *unwritten* policy of prohibiting private service line connections to an abutting water main via a legally established flag lot configuration, its application of that

[1] SPU's rules and policies are published at https://www.seattle.gov/utilities/about/policies. This Court may take judicial notice of SPU's policy page because the documents are hosted on a public website and are "not subject to reasonable dispute." *United States ex rel. Parikh v. Premera Blue Cross*, No. C01-0476P, 2006 WL 2841998, at *3–*4 (W.D. Wash. Sept. 29, 2006) (reports found on government websites are self-authenticating under Fed. R. Evid. 902(5)).

unwritten policy to Oom Living's application for a water availability certificate was arbitrary and capricious." CP 1251.

3. Seattle's claim that the water main extension condition required no dedication of property is contrary to its admissions in the record as well. SPU's Rule 30(b)(6) official testified that, once the extension is constructed and installed, Oom Living would be required to convey the improvements to the City as a "donated asset." CP 1148; *see also* CP 1237 (clarifying that SPU's use to the word "donated" does not mean "voluntary"—the "donation" is "required"). Consistent with that testimony, the City's Answer to Oom Living's Second Amended Complaint also admitted that "Once the required water main extension is constructed, the City requires that it be dedicated to the City." CP 526 (Second Amended Complaint, ¶ 3.21); CP 598 (Answer, admitting ¶ 3.21).

CORRECTION TO CITY'S STATEMENT OF FACTS AND OMISSIONS

Seattle's statement of facts omits all discussion of the SPU Director's findings and rationale for denying Oom Living's proposed connection and instead conditioning the issuance of a WAC on a requirement that the owner extend the water main onto 39th Avenue SW. CP 801–05. Oom Living's complaint alleged that the Director's decision violated mandatory provisions of the municipal code and applicable agency rules, was arbitrary and capricious, and violated the constitutional "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan* under both 42 U.S.C. § 1983 and as those standards are incorporated into RCW 82.02.020. CP 447–54 (Second Amended Complaint). The trial court agreed and enjoined SPU from enforcing the water main extension condition and furthermore directed the agency to issue a WAC approving Plaintiffs connection to the abutting water main under SW Elmgrove Street. CP 1251.

It is fundamental that when reviewing an agency's adjudication of private rights, the court must consider only on the basis articulated by the agency itself. *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). As a corollary to that rule, "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Id*. Yet Seattle makes no mention of the Director's findings and conclusions in its Opening Brief and offers no defense for them on appeal. Seattle's refusal to do so seriously distorts the facts and issues presented.

The following statement of facts fills in critical information about the administrative proceedings omitted by Seattle.

A. SPU Does Not Regulate the Length of Service Lines on Private Property

Seattle's overarching theory on appeal is that SPU was justified in denying Oom Living's proposed connection to the main in SW Elmgrove Street because longer private service lines are more likely to leak than shorter lines. Opening Br. at 13–16,

52–53. That is a red herring. SPU has confirmed that the agency does not regulate the length or composition of service lines on private property and cannot approve or deny a WAC application based on the length of the service line. CP 754.

SPU is a public utility responsible for providing water (and other utilities) to properties within the City. *See* Ch. 3.32 SMC. SPU's authority to adjudicate a WAC application is governed by Ch. 21.04 SMC. Critical to this case, SPU's Rule 30(b)(6) official testified that the agency regulates *only* the connection to the water main: "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." CP 774; CP 750 ("service line length [is] not part of our WAC approval process"). Accordingly, the SPU official explained that there "wouldn't be … a maximum" line length for "one single family residence and one detached accessory dwelling unit." CP 749; *see also* CP 751–52 (testifying that SPU has no standards regarding service line length).

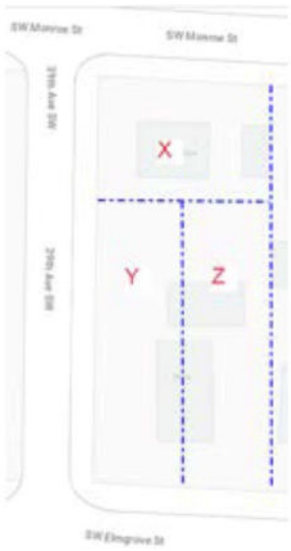
This limitation of SPU's regulatory authority bears directly on Seattle's claim that SPU was "following its policy against flag pole lot connections" when it denied Oom Living's proposed connection and imposed the extension requirement. Opening Br. at 11. The substance of that undisclosed policy shifts throughout Seattle's briefing. Most times, the City claims that the policy addresses SPU's concerns with longer service lines. *See* Opening Br. at 52–53. Yet at other times, the City urges that the policy is concerned with "creative lot configurations"—another concern that falls outside the agency's regulatory authority.[2] *See id*. at 6 (stating that "SPU's engineering experts prohibit connections to creatively subdivided lots"); *see also* CP 771–72 (SPU's policy holds that "a flag-lot doesn't count as frontage.").

[2] SPU does not regulate lot configuration either. That authority is delegated to Seattle Department of Construction & Inspections ("SDCI"). SMC 3.06.010; SMC 3.06.030.B; *see also* CP 747, 759 (confirming that SDCI approved the subject flag-lot).

The only evidence of the agency's policy in the record indicates that it is (wrongly) intended to ban a lawful lot configuration, not long service lines. SPU's Rule 30(b)(6) official testified that the agency had no policy addressing the City's concerns relating to long service lines:

> The City does not have a policy for water pertaining to long service lines. And when they are—what the maximum length that those can be. There is no policy that states that.

CP 752. Accordingly, the official confirmed that SPU would have approved a service line of the exact same length had Parcel Y been configured consistent with the following diagram on the left (CP 1140–42):

NO MAIN EXTENSION REQUIRED	OUR CURRENT PROPOSAL MAIN EXTENSION REQUIRED
	

CP 62.

B. The Proposed Development and Conditioned WAC Decision

Oom Living is a small woman-founded and operated company that has been building custom homes in the Seattle market since 2014. CP 712. In May 2022, Oom Living purchased two previously developed residential lots in West Seattle. CP 712–13, 1093. Oom Living planned to subdivide the properties into three lots and replace two outmoded houses with a new

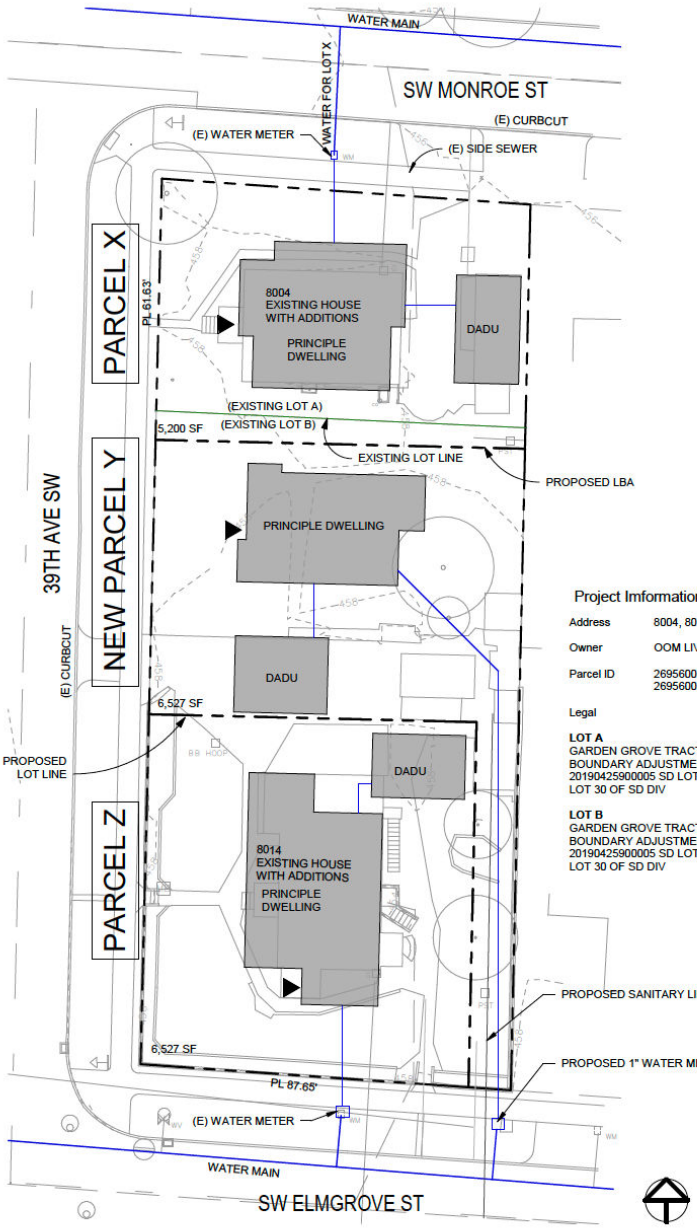
custom home and accessory dwelling unit on each parcel—a plan that would create six residential units where there previously had been two. CP 712–13.

As originally configured, the two lots spanned the entire eastern side of 39th Avenue SW between SW Monroe Street on the north and SW Elmgrove Street on the south. CP 713–14. Each of the two houses was already connected to SPU water service, with the north lot connecting to the water main under SW Monroe Street and south lot connecting to the water main under SW Elmgrove Street. *Id*. There is no water main under this block of 39th Avenue SW. CP 714.

CP 713.

In October of 2022, Oom Living applied to subdivide the properties into three lots, to be known as Parcels X, Y, and Z. CP 714. Leading up to the subdivision application, Oom Living sought direction from SDCI regarding the configuration of the new lots. *Id*. Together, they settled upon, and SDCI ultimately approved, a configuration that placed Parcel X at the corner of SW Monroe Street and 39th Avenue SW, Parcel Z at the corner

of SW Elmgrove Street and 39th Avenue SW, and Parcel Y in between, with frontage both on 39th Avenue SW and on SW Elmgrove Street via a flagstick that ran along the east side of Parcel Z. *Id*. The lot layouts approved by the City in Oom Living's short plat are depicted as follows:


WATER MAIN
SW MONROE ST
(E) CURBCUT
(E) WATER METER
WATER FOR LOT X
(E) SIDE SEWER
PARCEL X
PL 61.63'
8004
EXISTING HOUSE
WITH ADDITIONS
PRINCIPLE
DWELLING
DADU
(EXISTING LOT A)
(EXISTING LOT B)
5,200 SF
EXISTING LOT LINE
PROPOSED LBA
39TH AVE SW
NEW PARCEL Y
PRINCIPLE DWELLING
(E) CURBCUT
DADU
6,527 SF
PROPOSED
LOT LINE
DADU
PARCEL Z
8014
EXISTING HOUSE
WITH ADDITIONS
PRINCIPLE
DWELLING
PROPOSED SANITARY LINE FOR LOT Y
6,527 SF
PROPOSED 1" WATER METER FOR LOT Y
PL 87.65'
(E) WATER METER
WATER MAIN
SW ELMGROVE ST
Project Imformation
Address 8004, 8010, 8014 39th AVE SW
Owner OOM LIVING LLC
Parcel ID 2695600425 - LOT A
2695600430 - LOT B
Legal
LOT A
GARDEN GROVE TRACTS PCL A SEATTLE LOT BOUNDARY ADJUSTMENT # 3032176-LU REC# 20190425900005 SD LOT BOUNDARY ADJUSTMENT DAF LOT 30 OF SD DIV
LOT B
GARDEN GROVE TRACTS PCL B SEATTLE LOT BOUNDARY ADJUSTMENT # 3032176-LU REC# 20190425900005 SD LOT BOUNDARY ADJUSTMENT DAF LOT 30 OF SD DIV
Sheet
PA2
Short Plat
OOM Living
8004 39th Ave SW
03/31/23
SHUGART WASSE WORKSHOP

CP 85.

Oom Living principally designed Lot Y in a flag-lot configuration *at SDCI's recommendation* in order to facilitate a side sewer connection for Parcel Y to the existing sewer main in SW Elmgrove Street, as City policy requires that sewer connections be installed within fee ownership, and not in a sewer easement burdening an adjoining parcel. CP 715.

SPU's Rule 30(b)(6) official confirmed that flag-lots are legal within the City. CP 748. Indeed, Seattle's lot design standards expressly allow up to 6 lot lines (SMC 23.22.100.C.3.c) and requires that lots have a minimum "street frontage" of 10 feet—the very hallmarks of a flag-lot. SMC 23.22.100.C.3.a ("If a lot is proposed with street frontage, then one lot line shall abut the street for at least 10 feet."). Thus, as evidenced by the SDCI's short plat approval, the flagpole portion of Lot Y has sufficient frontage on SW Elmgrove Street to meet the City's design standards and furthermore meets the municipal

code's definition of "abutting." *See* SMC 23.84A.002 (Definitions "A") ("'Abut' means to border upon").

1. SPU Mistakenly Cancelled Oom Living's First WAC Application

Shortly after SDCI approved the short plat, Oom Living filed its first application to establish water service for the residence on Lot Y. CP 803. SPU, however, refused to process the application based on its mistaken belief that Oom Living was the same party that had unsuccessfully applied for a water connection in 2021—a year before Oom Living purchased the properties. *Id*. (citing SPUE-WAC-21-02133). According to SPU's initial assumption, Oom Living's proposed subdivision was an attempt *by the prior unrelated owner* to avoid an extension requirement that had been imposed on the former owner's materially different development plan. *Id*. (citing the agency's anti-avoidance rule, WTR-440, § VI.C.3.c).

SPU's mistake was obvious. In 2021, the prior owner sought a WAC for a subdivision that had proposed four lots, with at least one having its only frontage on 39th Avenue SW. CP 716.

Based on *that proposal*, SPU denied the applicant's request to run a private service line from that parcel and through 39th Avenue SW in order to connect with the main in SW Elmgrove Street in the public right-of-way. Thus, based on amendments to SMC 23.10.061.A, SPU determined that the former owner/applicant would have to extend the water main onto 39th Avenue SW in order to establish water service for the parcel that had frontage only on that street. CP 803. The former owner chose not to proceed with the proposed development and SPU closed the 2021 WAC application. *Id*.

Oom Living eventually convinced SPU that its decision to close its 2022 application was a mistake: the agency had disregarded the change in ownership, the different nature of the proposals, and failed to follow agency rules stating that an existing WAC no longer applies—even within the same project, never mind *an entirely new proposal*—if there are changes that impact water service requirements. WTR-440, § VI.E. Thus, after discussion, SPU determined that Oom Living could reapply

for a WAC. CP 803. But SPU's initial assumptions and its demand for a water main extension would continue to influence its decisionmaking on Oom Living's second WAC application.

2. SPU Conditionally Denied Oom Living's Second WAC Application

Oom Living filed a second WAC application on March 31, 2023. CP 84–85. The application requested to connect the residence on Lot Y directly to the abutting water main on SW Elmgrove Street via the flagstick that SDCI had approved for connecting to the sewer main. *Id*. Given the City's initial misapprehensions, Oom Living supported its application with a short memorandum setting out the facts and circumstances supporting its request. CP 86–89. This should have been a simple and speedy process because the application to connect to an abutting and suitable main satisfied the criteria of Ch. 21.04 SMC and SPU Director's Rule WTR-440, for approving the connection. CP 84 (SPU's Rule 30(b)(6) official testifying that the application met all criteria of SMC 21.04.050 and WTR-440, § VIII.A.3). Indeed, SPU's Rule 30(b)(6) official testified that

the agency's consideration of a WAC application "starts with 'Is there a standard or suitable main across the frontage of the property? … [I]f the answer to that is yes, then it's approved. No other consideration." CP 771.

But SPU *still* would not approve Oom Living's proposed connection to the main in SW Elmgrove Street. On April 6, 2023, SPU issued a decision refusing to approve a water connection for Lot Y unless Oom Living signed a contract binding it to "[d]esign and install approximately 173 feet of 8-inch ductile iron pipe water main in 39th Ave SW, extending from SW Elmgrove St to the northern parcel boundary [of Parcel Y], including appurtenances." CP 93 ("Water availability for [the Lot Y] is not approved at this time."). Once completed, Oom Living would have to dedicate the extension, including all pipes and fixtures purchased to construct it, to the City as a "donated

asset." CP 526; 598; 1148; 1237. Oom Living estimated that the cost of that compelled "*gift*" would be approximately $355,000.[3]

3. Administrative Appeals and the Final Agency Decision

Unable to proceed with the plans for Parcel Y without a certificate approving a water connection, Oom Living sought administrative review of the water main condition via the process set forth in SPU Director Rule ENG-430 by signing the City's commitment contract for construction of the water main extension under protest. CP 718. Oom Living's appeal raised the same statutory and constitutional arguments at issue here and furthermore argued that the extension was not necessary to service Lot Y. *Id*.; *see also* SPU Director's Rule WTR-440, § VI.A (a WAC may contain "conditions necessary to provide

[3] Although the City claims that the water main extension would cost "only" $173,000 (Opening Br. at 12), SPU's Rule 30(b)(6) official testified that, based on the agency's experience, an extension could cost as much as $2,000 per linear foot for a total of $346,000. CP 775 (discussing extra costs attributable to prevailing wages and city oversight).

water service to the parcel"); *id.* at § VI.D (a WAC "provides information to allow for planning of the water infrastructure improvements that may be necessary for the proposed project.").

Although the WAC decision contained no explanation why SPU denied the proposed connection, Oom Living's appeal statement *once again* addressed the obvious mistakes of fact and law contained in conversations with staff. CP 40–59. Most notably, Oom Living argued that the City had mischaracterized its proposed service line as a "spaghetti line." CP 42, 50, 54, 64–65. A spaghetti line is a term-of-art for private water lines *that wander under public right of ways (or other private parcels)* to connect to a non-adjacent main.[4] CP 911. By contrast, Oom

[4] In the past, SPU approved such lines to accommodate development in areas where the public water system was not adequately gridded. CP 351, 911. But due to problems associated with running lines through the right-of-way (and/or neighboring properties) (*id*.), SPU adopted an official policy restricting spaghetti lines in 2011 (CP 915–19), then in 2021 the City Council amended Ch. 21.04 SMC to require that properties *not abutting an existing main* pay to extend the water main, obviating the need for spaghetti lines. *See* SMC 21.04.061.A. *See* City of Seattle Ord. 126268, at 4 (Jan. 7, 2021) (amending SMC

Living's proposed service line would be entirely contained within Oom Living's own property and would tee off the abutting SW Elmgrove Street main where it would directly enter the parcel—exactly as set forth in SMC 21.04.050. CP 84–85, 716.

To the extent SPU officials had expressed their dislike for flag-lots during the permitting process, Oom Living's appeal statement argued that there was no published rule or policy prohibiting connections on flag-lots. CP 277–78 (referring to SPU's "purported prohibition on flag lots"). Oom Living additionally argued that an SPU rule or policy banning flag-lot connections would exceed the agency's expressly limited authority. *Id*.

SPU's review committees disregarded the facts provided in support of Oom Living's appeal and would not budge from the agency's prior determinations. Accordingly, the officials denied the appeal upon determining that (1) Oom Living's proposed

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21.04.061.A) (available at https://mcclibraryfunctions.azurewebsites.us/api/ordinanceDownload/13857/1062603/pdf).

subdivision was the same project as the former owner's 2021 proposal and was therefore subject to the water main extension requirement on the earlier application, and (2) that the application proposed a prohibited "spaghetti line." CP 796–800 (manager level review); CP 801–05 (director level review). The Director's decision does not mention the agency's flag-lot policy and does not respond to (*and does not deny*) Oom Living's objection that the extension was not necessary to provide service to Lot Y. *Id*. Instead, the Director's decision concluded *only* that the "water main extension is necessary for the orderly extension and efficient gridding of the public water system."[5] CP 804.

[5] Even *that* conclusion of public necessity goes too far. When asked at deposition how SPU determines that a water main extension is necessary for the orderly development of the system, SPU's Rule 30(b)(6) official testified that SPU's "needs" are identified in its "2019 water system plan." SPU's more general "wants" are not. CP 1234–35. The subject block of 39th Avenue SW is not identified in the system plan and therefore qualifies as an agency "want." CP 1213.

C. The Lawsuit

Because the SPU Director's final agency decision cannot be appealed through the Land Use Petition Act (Ch. 36.70C RCW),[6] Oom Living's lawsuit sought damages, declaratory, and equitable relief to enforce its statutory and constitutional rights.[7] CP 426–55 (operative complaint).

Faced with obvious mistakes in the Director's decision, Seattle abandoned the agency's determination that Oom Living had proposed a spaghetti line in its pleadings before the trial court. Indeed, the City could not credibly defend that conclusion after SPU's Rule 30(b)(6) official testified it "would be a mistake" to deny a WAC on that basis. CP 753.

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[6] *Pioneer Square Hotel Co. v. City of Seattle*, 13 Wn. App. 2d 19, 26–27, 461 P.3d 370 (2020).

[7] While the lawsuit was pending, SPU agreed to allow Oom Living to establish a temporary connection from the residence on Lot Y to the water main under SW Elmgrove Street, subject to a requirement that Oom Living post and maintain a bond in the amount of $355,000. CP 690. The temporary line is configured exactly as Oom Living proposed in its applications. Opening Br. at 12–13.

Seattle also abandoned the Director's determination that Oom Living's development project was the same as the one that had been proposed by the former owner. CP 803 (characterizing both proposals as "this project"). Instead, in its pleadings to the trial court (and again here), the City pivoted to argue:

(1) That SPU had banned flag-lot connections by rule or policy;[8]

(2) Making Lot Y's frontage on SW Elmgrove Street legally unavailable for a water connection;

(3) Which in turn left Lot Y with frontage only on 39th Avenue SW;

(4) Thus, requiring that the application to be reviewed under code and rule provisions that apply to parcels that do not abut a main.

SMC 21.04.061.A. CP 888–90; *see also* Opening Br. at 50–52.

Ruling on cross-motions for summary judgment, the trial court rejected Seattle's arguments and ruled in favor of Oom Living on each and every claim. CP 1249–52. Addressing the SPU Director's decision, the court "enjoined [SPU] from enforcing the water main extension condition and is directed [it]

[8] CP 101, 158, 335–36, 891, 1081, 1083.

to issue a water availability certificate approving Plaintiffs connection to the abutting water main under SW Elmgrove Street." CP 1251. SPU later stipulated that the trial court's ruling on summary judgment would establish its liability for depriving Oom Living of federal constitutional rights and agreed to pay $274,892 in compensatory damages and attorneys' fees should the order be upheld on appeal. CP 1424–28.

To date, SPU has not issued an approved WAC to Lot Y, which continues to be served by the temporary connection to the main in SW Elmgrove Street.

D. Seattle's Speculation About Potential Alternatives for Compensation Is Baseless

Seattle suggests that Oom Living's lawsuit was unnecessary because, if it had simply complied with the extension demand, it might recover a portion of the expense through the state's "latecomer" statute. Opening Br. at 7–8 (citing RCW 35.91.020(1)(a)). That argument is baseless. With Oom Living's development, the subject block of 39th Avenue SW is fully built out and all lots are connected to water. CP 713.

There is no additional development planned for the block and no opportunity to collect a latecomer contribution.[9]

Seattle alternatively suggests that a $355,000 expense would have little impact on Oom Living's economic expectations in regard to Lot Y. Opening Br. at 12, 26. Again, that claim has no bearing on the issues before this Court. SPU's Rule 30(b)(6) official boldly testified that the agency does not consider economic impacts when it requires owners to construct and finance public infrastructure:

> 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.

[9] Indeed, there is only one property 39th Avenue SW that is not directly connected to an abutting main. And at deposition, SPU's Rule 30(b)(6) official testified that, if the extension is built, the City will cover the cost to connect a neighboring property that is currently connected to the main under SW Elmgrove Street via a previously approved spaghetti line. CP 1143–44, 1147–48; *see also* CP 1160 (map indicating the neighboring property that would benefit from the exaction).

...

> 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.

CP 772–73.

Even so, Seattle's attempt to downplay the impact of SPU's condition speculates that Oom Living profited from the project based solely on the final sale price of Lot Y—which is non-record information.[10] Opening Br. at 12, 26. But the City obviously cannot establish whether or not Oom Living profited by simply comparing the sales price against the property's purchase price because that calculation fails to consider such things as the cost of planning and design, the cost of materials

[10] The City's citation to the record provides only the *listing* price of Lot Y. The City does not disclose the source of its information for the final sales price and has neither moved for judicial notice or to supplement the record. Thus, the portions of its opening brief that rely on that non-record information should be disregarded.

and labor, holding costs, sales costs, the cost of servicing the bond, etc. The City's claims should be disregarded.

SUMMARY OF ARGUMENT

This case has nothing to do with the policy failures that contributed to the Great Fire of 1889, and nothing to do with the City's general authority to plan or improve its water system. Opening Br. at 1. It is about agency overreach: SPU withheld an approval that the municipal code requires and attempted to impose a six-figure condition that the agency never found was necessary to serve the property.

First, the superior court correctly concluded that SPU's water main extension requirement violated the municipal code and SPU's implementing rules. City code provides that where the premises "abut[s] upon a street in which there is a City water main," SPU "shall" cause the premises to be connected to that main. SPU's published rules likewise set out the criteria under which "a water main extension is not required." Oom Living's proposed connection satisfied those criteria, and the City does

not dispute that it did. The Director nevertheless denied the connection based on misapplication of an anti-avoidance provision that, by its own terms, preserves only requirements that applied *before* a subdivision—not new requirements imposed afterward.

Second, SPU's denial of the proposed connection was arbitrary and capricious because it was based on an unpublished and previously undisclosed policy standard. The record shows that SPU claimed to be applying a "policy [that] a flag-lot doesn't count as frontage," and the City confirms on appeal that SPU was "[f]ollowing its policy against flag pole lot connections." But no such policy appears in SPU's published Director's Rules, was identified in the Director's final decision, or was produced in discovery. Washington law does not permit an agency to adjudicate private rights based on secret standards—especially where doing so contradicts the published approval criteria and enacted code provisions the applicant satisfied.

Third, the water main extension condition is subject to and violates RCW 82.02.020. The trial court correctly ruled that the City failed to meet its burden of showing the demanded public infrastructure was "reasonably necessary as a direct result of the proposed development." The Director's final decision confirms that the extension was required not to provide service to Lot Y, but instead for "orderly extension and efficient gridding" of the public system. That rationale describes a generalized system-planning objective, not a project impact. RCW 82.02.020 does not permit the City to shift the costs of broad public infrastructure goals onto a single permit applicant through an adjudicative condition.

Fourth, the extension condition is an exaction subject to the federal doctrine of unconstitutional conditions. SPU leveraged its authority to withhold a WAC—an essential prerequisite to building—to compel Oom Living to fund and dedicate public infrastructure. Yet the City does not defend the condition under the "essential nexus" and "rough

proportionality" tests. Instead it argues for categorical exemptions inconsistent with *Nollan*, *Dolan*, and *Koontz*. The trial court correctly held that the City failed to justify the exaction and that the condition violates the Takings Clause as applied through the unconstitutional conditions doctrine.

The trial court's judgment should be affirmed.

STANDARD OF REVIEW

Seattle asks this Court to review the trial court's conclusions that SPU's water main extension requirement was unlawful, arbitrary and capricious, and violated the doctrine of unconstitutional conditions predicated on the Takings Clause of the Fifth Amendment of the United States Constitution. Opening Br. at 1–2. Because the trial court ruled on cross-motions for summary judgment, this Court reviews the court's conclusions de novo. *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014).

ARGUMENT

I.

THE SPU DIRECTOR'S DECISION FAILED TO COMPLY WITH CITY CODE AND AGENCY RULES

Seattle's appeal does not address the basis for the trial court's conclusion that the Director's decision "conflicts with the City code." CP 1250. The City code is perfectly clear in establishing when SPU *can* and *cannot* require a water main extension as a condition of issuing a WAC: SPU may demand a water main extension where the parcel *"does not abut*" a street containing a standard or suitable City water main,[11] but it may not impose an extension requirement where the property "abut[s] upon a street in which there is a City water main." SMC 21.04.050. If the parcel abuts a suitable water main, the code mandates that SPU "*shall* cause the premises …to be connected with the City's water main." SMC 21.04.050 (emphasis added); *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)

[11] SMC 21.04.061.A (emphasis added).

(the use of the word "shall" is an "imperative and operates to create a duty rather than conferring discretion.").

SPU's implementing rules are in accord, confirming that a water main extension "is not required" where the owner seeks a single service line, as is the case here, and the subject property abuts a suitable main:

> 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;
>
> (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.

CP 733 (WTR-440, § VIII.A.3) (emphasis added).

As in the Director's decision, Seattle does not address these criteria in its Opening Brief and does not contest that Oom Living satisfied each of them. Indeed, SPU's Rule 30(b)(6) official confirmed that the WAC application met the standards set out by SMC 21.04.050 and WTR-440, § VIII.A.3:

Q: Is the water main within Southwest Elmgrove Street a standard or suitable water main?

A: Yes.

Q: And does that water main exist along the full

extent of the southern boundary of Parcel Y?

A: Referring to the 10-foot flag section of it? Yes.

CP 756.

Q: Parcel Y abuts a City water main, correct?

A: Yes.

Q: And the water main in SW Elmgrove Street is standard and suitable?

A: Yes.

CP 1246.

Q: …there were criteria a. through c., about when a water main extension is not required on a parcel. Do you recall those?

A: Yes.

Q: …you indicated that Oom Living's Parcel Y meet those criteria?

A: I did.

CP 764.

Seattle does not defend SPU's rationale for failing to approve the connection as required by SMC 21.04.050 and WTR-440, § VIII.A.3. And it could not credibly do so. As discussed above, the Director's decision denied the proposed connection based on SPU's mistaken assumption that Oom Living's proposed subdivision was the same project as the former owner's 2021 proposal. CP 803. From that, the Director concluded that the application was subject to a rule that prohibits property owners from using a "division, redivision, or lot boundary adjustment of land" to avoid valid water main installation requirements. CP 802–03.

The Director's conclusion was clear error because it omitted language expressly limiting the rule's application to *only* those installation requirements "*that would apply before the division, redivision, or lot boundary adjustment*." CP 729 (WTR-440, § VI.C.3.c) (emphasis added). Here, SPU's Rule 30(b)(6) official testified that, before approval of Oom Living's short plat,

there was no water main installation requirement imposed on the lots purchased by Oom Living:

> Q. The condition of Parcel A and Parcel B prior to the City's approval of the short plat was such that there was no requirement on those property owners to install a water main extension in 39th Avenue Southwest?
>
> A. Correct.
>
> Q. And it was the approval of the short plat and the request to build a structure on Parcel Y that, from the City's perspective, then required construction of a water main extension on 39th Avenue Southwest?
>
> A. That is correct...

CP 763.

Seattle does not contest the SPU official's testimony and provides no basis to disturb the trial courts' conclusion that the Director's decision "conflicts with the City code and does not follow from the subsection's plain language." CP 1250.

II.

SPU's APPLICATION OF AN UNPUBLISHED POLICY TO DENY THE PROPOSED CONNECTION WAS ARBITRARY AND CAPRICIOUS

Seattle's position on whether SPU applied an unpublished "flag-lot" policy is wildly inconsistent. At times, the City denies that SPU applied such a policy. Opening Br. at 52–53. But at other times, Seattle readily states that SPU was "following its policy against flag pole lot connections" when it denied Oom Living's proposed connection and imposed the extension requirement. *Id*. at 11. The City's latter statement is consistent with testimony from SPU Rule 30(b)(6) official explaining that the agency adopted a "policy [that] a flag lot does not count as frontage." CP 770–71. Because the City offered no contradictory evidence (and makes no such argument here), it is bound by the official's sworn testimony. *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). The record, therefore, confirms that SPU applied an *unwritten* and *unpublished* policy.

Seattle's decision to ignore the testimony of SPU's Rule 30(b)(6) official is fatal to its appeal of this issue. Indeed, as part

of its strategy of (sometimes) denying the policy, the City does not contest that an agency adjudication of private rights based on unpublished standards or policies "presents a textbook example of arbitrary and capricious action." *Maranatha Min., Inc. v. Pierce Cnty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990); *see also Rios v. Washington Dep't of Lab. & Indus.*, 145 Wn.2d 483, 507–508, 39 P.3d 961 (2002). The trial court correctly concluded that SPU's application of the policy to deny Oom Living's proposed connection was arbitrary and capricious. CP 1251.

Even if this Court were to consider Seattle's characterization of SPU's policy as an agency interpretation of Rule WTR-440, § VI.C.3.c, the argument is unavailing. Opening Br. at 52–53. Agencies are creatures of statute. As such, an agency's authority "is limited to those powers *expressly* granted [by the delegating statute], and if any doubt exists related to the granting of this power, it must be denied." *Ent. Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005) (emphasis added). Here, the plain language of

SMC 21.04.061.A directs SPU to enact formal rules implementing *that subsection alone* by adopting rules for properties "not abutting a street(s) in which there is a standard or suitable City distribution water main." SMC 21.04.061.A. That provision does not authorize SPU to enact as rules or policies altering the definition of "frontage" in order to sweep abutting properties into that rule.[12]

Whether Seattle refers its ban on flag-lot connections a "policy" or something else does not matter because City's administrative code directs agencies to publish all rules, policies, or interpretations "formulated, adopted, or used by the agency in the discharge of its functions." SMC 3.02.070.B. And the record

[12] Nor is there any lawful basis for such an interpretation because SPU's regulatory authority admittedly stops at the edge of the street—it has no authority to deny WAC applications due the configuration of lots or the length of service lines on private property. CP 749–52, 774. Thus, Seattle's claim that SPU's policy/interpretation merely reflects the agency's "desire to prevent future property owners from increased leaks and maintenance costs" constitutes an admission that the agency decision was based on considerations that are outside its authority. Opening Br. at 53.

confirms that SPU did not publish a rule, policy, or interpretation pertaining the flag-lots. Thus, even if Seattle's claim was credited, it would lead to the same conclusion that SPU arbitrarily adjudicated Oom Living's WAC application under unpublished and undisclosed standards that exceed agency authority and depart from the published criteria set out by SMC 21.04.050 and WTR-440, § VIII.A.3. *Maranatha Min., Inc.*, 59 Wn. App. at 804.

Finally, Seattle's insistence that SPU was simply acting out of a concern that long private service lines may increase the risk of leaks and maintenance costs confirms the arbitrariness of the agency decision. SPU's Rule 30(b)(6) official forcefully testified that the agency does not regulate the length of service lines on private property and, furthermore, that the agency has no policies addressing those concerns. CP 752.

The trial court's conclusion that SPU's decision was arbitrary and capricious should be affirmed.

III.

THE EXTENSION CONDITION IS SUBJECT TO RCW 82.02.020

Seattle does not challenge the trial court's conclusion that "[t]he City has failed to meet its burden of showing that the extension was 'reasonably necessary as a direct result of the proposed development'" and therefore "violates RCW 82.02.020." CP 1251. Instead, the City insists that the permit condition is exempt from that scrutiny because: (1) the extension requirement "is not aimed at resolving general social ills" (Opening Br. at 45–47), and (2) SPU's authority to demand the extension is derived from a statute that predates RCW 82.02.020. Opening Br. at 42, 47–49. Wrong on both claims.

A. A Permit Condition Demanding New Public Infrastructure Is an Indirect Fee or Charge on Development

Seattle's claim that the extension requirement is not subject to RCW 82.02.020 relies *once again* on its false narrative that the water main extension is necessary to service Lot Y, and "is not aimed at resolving general social ills." Opening Br. at 45–

47 (*citing Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 890, 795 P.2d 712 (1990)). But as discussed above, the Director determined only that "the water main extension is necessary for orderly extension and efficient gridding of the water system." CP 804. Indeed, the City's attorney also insisted that "[t]he purpose of the main extension requirement is to encourage the development of a water main grid system so that new developments will have an adequate water supply." CP 68. Consistent with those statements, SPU's Rule 30(b)(6) official testified that the extension requirement was intended to address a preexisting condition in the City's water system. CP 776. Seattle's failure to address these several prior City admissions is fatal to its argument.

SPU's extension condition is not meaningfully different from other permit conditions requiring developers to pay for new public infrastructure, which are routinely held subject to RCW 82.02.020. *See*, *e.g.*, *Trimen Dev. Co. v. King Cnty.*, 124 Wn.2d 261, 273, 877 P.2d 187 (1994) (park fee); *View Ridge Park*

Assocs. v. Mountlake Terrace, 67 Wn. App. 588, 599, 839 P.2d 343 (1992) (recreational facility fee); *City of Fed. Way v. Town & Country Real Est., LLC*, 161 Wn. App. 17, 45, 252 P.3d 382 (2011) (traffic infrastructure fee); *Ivy Club Invs. Ltd. P'ship v. City of Kennewick*, 40 Wn. App. 524, 529, 699 P.2d 782 (1985) (park fee). Just like a condition that demands money to purchase recreational property or fund traffic infrastructure, SPU's permit condition demanded that Oom Living spend upwards of $355,000 to design and install a water main extension to address a deficiency in the public water system. CP 457. And once installed, the City requires that it be dedicated to the public. CP 526 (Second Amended Complaint, ¶ 3.21); CP 598 (Answer, admitting all claims in ¶ 3.21); *see also Pioneer Square Hotel*, 13 Wn. App. 2d at 26. SPU's extension demand is unquestionably aimed at resolving problems with the public water system and is subject to RCW 82.02.020.

B. SPU's Authority to Demand New Infrastructure on an Ad Hoc Adjudicative Basis Is Subject to RCW 82.02.020

Seattle alternatively claims that SPU is categorically exempt from RCW 82.02.020 because its authority to demand a water main extension derives from city code and statutory provisions that predate the 1982 amendments to RCW 82.02.020. Opening Br. at 47–48. But to claim that exemption, the City must show that the earlier-enacted statute and/or code provision specifically authorized the exaction at issue. *Trimen*, 124 Wn.2d at 269. Seattle cannot satisfy that burden.

As originally enacted, Seattle's municipal code contained no requirement that an applicant extend the water main as a condition of receiving an approved WAC. *See* City of Seattle Ord. 112035, § 1, 1984 (amending 1935 code).[13] Nor did the code delegate the authority to demand such an extension to the water utility. *Id*. Instead, the provision in effect from 1935

[13] Available at http://clerk.seattle.gov/~archives/Ordinances/Ord_112035.pdf

through 1984 merely set out the contents of an application and imposed a requirement that the applicant sign a contract agreeing to pay the use rates set by the City.[14] Seattle first added an extension requirement (with an associated delegation of rulemaking authority) *in 1984*:

> In case of application for water service to supply premises not abutting upon a street in there is a standard city watermain, ((~~the City will lay its connection from the main toward the premises for a distance equal to the distance from the main to the curbline, said distance in no case to exceed forty feet, and permit connection therewith by means of a union and pipes laid at the expense and maintained by the owner of the service,~~)) the Superintendent will require construction of a standard watermain abutting the property before a connection is made. The Superintendent, pursuant to the Administrative Code (Chapter 3.02), shall establish criteria and procedures for making the aforementioned exceptions.

Id. Thus, there is nothing in the City code supporting Seattle's claim that SPU's exaction authority predated the 1982 amendments to RCW 82.02.020.

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[14] *See* City of Seattle Ord. 65877, § 5, 1935 (available at https://clerk.seattle.gov/~archives/Ordinances/Ord_65877.pdf).

Seattle's claim that SPU's authority derives from RCW 35.92.025 is also baseless. There is nothing in that statute authorizing the City to exact water system infrastructure from WAC applicants on an ad hoc adjudicative basis. Instead, per its plain terms, RCW 35.92.025 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.*

Id. (emphasis added); *see also Westridge-Issaquah II LP v. City of Issaquah*, 20 Wn. App. 2d 344, 368, 500 P.3d 157 (2021) (concluding that RCW 35.92.025 authorizes municipalities to adopt legislative connection fee schedules based on "the equitable share of property owners as a class.").

SPU's ad hoc water main extension condition is not a "connection charge." Connection charges are generally imposed on all applicants in a predetermined amount established by SPU's annual schedule of costs. SMC 21.04.100-.125; *see also* RCW 35.92.025 (directing municipalities to set connection costs in an equitable manner). For example, SPU's current schedule estimates that the cost to establish a residential water connection is $14,300[15]—not the $173,000 to $355,000 required by the permit condition.

Unsurprisingly, the decisions that Seattle cites in support of its delegation argument involved challenges to generally applicable facility charges or connection fees set by legislatively enacted schedules. *Westridge-Issaquah*, 20 Wn. App. 2d at 370 ("general facilities charges" imposed per a legislatively enacted

[15] SPU's current schedule of connection costs is available at https://www.seattle.gov/documents/Departments/SPU/Engineering/DSO_Charge_Menu.pdf. This Court may take judicial notice of the schedule per ER 201. *Parikh*, 2006 WL 2841998, at *3–*4.

formula); *Tapps Brewing, Inc. v. City of Sumner*, 106 Wn. App. 79, 81, 22 P.3d 280 (2001) (same); *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 804, 732 P.2d 1013 (1987) ("utility connection fees" set pursuant to local ordinance). None of those cases address whether SPU's authority to impose ad hoc, adjudicative conditions on the issuance of Oom Living's WAC is subject to RCW 82.02.020. The trial court's ruling on this issue should be affirmed.

IV.

SPU'S EXTENSION CONDITION IS SUBJECT TO THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

SPU's permit condition demanded that Oom Living extend the water main by purchasing pipes and fixtures, paying for the labor to install the extension, and then gift all materials and improvements to the City as a so-called "donated asset." CP 93–94, 526, 598, 1148, 1237. It is axiomatic that when the government wants to take private property for a public use, it must compensate the owner at fair market value. *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 273, 144 S. Ct. 893, 218

L. Ed. 2d 224 (2024). In this way, the Takings Clause protects "individual property owners from bearing 'public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id*. at 273–74 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 156, 4 L. Ed. 2d 1554 (1960)).

The doctrine of unconstitutional conditions is designed to enforce these fundamental principles in the permitting context by holding permit conditions that demand a dedication of property subject to a heightened scrutiny "essential nexus" and "rough proportionality" test. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). Together, these tests recognize that government may require a landowner to dedicate property to a public use when it is shown to be sufficiently necessary to mitigate adverse public impacts of a proposed development, but it may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Id.* at 604–06.

The nexus and proportionality tests ensure that individual landowners are not singled out during the permitting process to bear the burdens of public policies—like addressing deficiencies in the public water system—that should be distributed among the public as a whole. *Dolan*, 512 U.S. at 84. Faithful application of these tests is essential to applicants, who "are especially vulnerable to the type of [impermissible burden shifting] that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 570 U.S. at 605.

The fact that a property owner may derive some benefit from an unconstitutional demand to fund infrastructure improvements does not make the demand 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." *Village of Norwood v. Baker*, 172 U.S. 269, 279, 19 S. Ct. 187, 43 L. Ed. 443 (1898). Indeed, the 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). And there is no special benefit here to be conferred anyway—Oom Living owns property that abuts an already constructed and suitable water main.

Even so, Seattle does not defend SPU's water main extension condition on the merits of the nexus and proportionality tests. CP 1251 (concluding that Seattle failed to satisfy the tests). Instead, the City offers a series of arguments urging that SPU's demand is exempt from the constitutional scrutiny required by *Nollan/Dolan*. Opening Br. at 20–41. None of the City's arguments have merit.

A. SPU's Water Main Extension Condition Seeks a Dedication of Property and Is Subject to the Doctrine of Unconstitutional Conditions

Seattle's argument fails to address its prior admissions that the water main extension condition requires a dedication of property. CP 526, 598. To reiterate, SPU's demand directed Oom Living to design the extension, purchase 173 feet of 8-inch ductile iron pipe and fixtures, secure permits to work in the public right-of-way, remove asphalt and trench, pay for labor to construct and install the water main extension, and pay for labor and materials to restore and repave the roadway, after which Oom Living is required to convey the materials and improvements to the City as a "donated asset." CP 93–94, 1148, 1237. That condition plainly demands that Oom Living hand over valuable materials and improvements, which are protected property.

Seattle's theory on appeal overlooks the fact that the Takings Clause protects all private property, not just land. "Although real property is the traditional realm of takings law,

the Fifth Amendment also protects against the taking of personal property without just compensation." *Sierra Med. Servs. All. v. Kent*, 883 F.3d 1216, 1225 (9th Cir. 2018) (citing *Horne v. Dep't of Agric.*, 576 U.S. 350, 358, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property."). In *Horne*, the U.S. Supreme Court held that the fruit of one's labor is personal property, "not public things subject to the absolute control of the state," and any demand that it be handed over for public use must be accompanied by just compensation. 576 U.S. at 367. SPU's demand would unquestionably effect a taking if imposed outside the permitting context. *Id*. Thus, SPU cannot leverage its authority by withholding water in order to compel a six-figure "donation" of Oom Living's "assets." *Koontz*, 570 U.S. at 608; *see also Horne*, 576 U.S. at 364 (a government demand that an owner surrender personal property (raisins) to the government is a per se taking).

Even if this Court were to consider Seattle's attempt to re-characterize the permit condition as seeking only an expenditure of money, it would still constitute an exaction. Indeed, *Koontz* controls the question whether SPU's demand that Oom Living pay to design and install a new public water main extension constitutes an exaction by holding that a condition requiring an owner to "spend money to improve public lands" is a "monetary exaction" and must, therefore, "satisfy the requirements of *Nollan* and *Dolan*." *Koontz*, 570 U.S. at 608, 619; *see also S.S. v. Alexander*, 143 Wn. App. 75, 92, 177 P.3d 724 (2008) (when considering federal questions, state courts are bound by decisions of the U.S. Supreme Court).

Instead of addressing the substance of the permit condition, Seattle's urges this Court to limit the holding of *Koontz* to apply only to fees imposed in lieu of a demand for a physical interest in the owner's land. Opening Br. at 22. But that argument fundamentally misunderstands the facts of the case. At issue in *Koontz* was an application to clear and grade a 3.7-acre

portion of his 14.2-acre parcel to prepare the property for future development. Because the proposal would impact land that had been designated as wetland habitat, Koontz offered to dedicate all remaining land in a conservation easement as part of his application.[16] The water district countered that it would only approve his application if—in addition to the volunteered easement—he agreed to install culverts and/or fill ditches on approximately 50 acres of degraded public wetlands miles away from the property.[17] *Koontz*, 570 U.S. at 601–02. Thus, the only

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[16] St. Johns River Water Mgmt. Distr., *Final Order In re: Coy A. Koontz Wetland Resource Management Permit Application No. 12-095-0109A*, at Finding of Fact (June 9, 1994) (finding that Mr. Koontz had proposed the conservation easement as full mitigation) (reproduced in Joint Appendix at *57, *Koontz v. St. Johns River Water Mgmt. Dist.*, U.S. Supreme Court No. 11-1447, 2012 WL 7687918 (U.S. Nov. 21, 2012).

[17] The district alternatively stated that it would approve if he resubmitted his application to propose only one acre of development and dedicate the remainder of the property to conservation purposes. Mr. Koontz rejected that alternative as non-viable because he would barely recoup his investment in the land with the full 3.7-acre proposal. Transcript of St. Johns River Water Mgmt. Distr. Regulatory Meeting re: Application by Coy Koontz (May 10, 1994) (reproduced in Joint Appendix at *30,

condition imposed by the government was the demand that he improve degraded public wetlands.[18]

The Florida courts (which were the factfinders) determined that the demand was a "non land-use monetary condition" that had been imposed "in the absence of a compelled dedication of land." *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So.3d 396, 397–98 (Fla. Dist. Ct. App. 2014) (*Koontz VI*); *see also St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 12 (Fla. Dist. Ct. App. 2009) (*Koontz IV*) (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.").

That finding was central to the case eventually decided by the U.S. Supreme Court because Florida courts had previously

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Koontz v. St. Johns River Water Mgmt. Dist., U.S. Supreme Court No. 11-1447, 2012 WL 7687918 (U.S. Nov. 21, 2012).

[18] *See*, *e.g.*, Respondent's Br. at *10, *Koontz v. St. Johns River Water Management District*, U.S. Supreme Court, No. 11-1447, 2012 WL 6694053 (U.S. Dec. 21, 2012).

held in-lieu fees (but not stand-alone fees) subject to the state's exactions doctrine. *Hollywood, Inc. v. Broward Cnty.*, 431 So.2d 606, 611–12 (Fla. Dist. Ct. App. 1983). Thus, the finding that the government imposed a "non land-use monetary condition" on approval of clear and grade permit set up the Florida Supreme Court's holding that would be reversed by the U.S. Supreme Court: that monetary demands are not exactions subject to *Nollan* and *Dolan* "[s]ince St. Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220, 1231 (Fla. 2011) (*Koontz V*); *id*. at 1230 (holding that *Nollan* and *Dolan* apply only to permit conditions demanding a dedication of real property).

The U.S. Supreme Court granted certiorari on the question "[w]hether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public

use."[19] The Court found the answer to that question in Justice Kennedy's opinion in *Eastern Enterprises v. Apfel*, where he explained that a regulation that allocates a public financial burden onto a private party will be a taking if it "operate[s] upon or alters an identified property interest." *Koontz*, 570 U.S. at 613 (quoting *E. Enterprises v. Apfel*, 524 U.S. 498, 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (Kennedy, J., concurring in part, dissenting in part)). *Koontz* reasoned that a monetary exaction meets that requirement because it involves a "demand for money" that "'operates upon an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." 570 U.S. at 613 (cleaned up). In this way, a monetary exaction is dissimilar to a general financial obligation because it is inextricably linked to and "burdens ownership of a specific parcel of land." *Id*. (cleaned up). That, the Court

[19] Petition for Writ of Certiorari at *i–ii, *Koontz v. St. Johns River Water Management Dist.*, U.S. Supreme Ct. No. 11-1447, 2012 WL 1961402 (U.S. May 30, 2012).

concluded, was "functionally equivalent to other types of land use exactions" and amounted to a taking of an interest in the real property itself. *Id*. at 612–13 ("In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property.").

Like the demand in *Koontz*, SPU's water main extension demand conditioned issuance of Oom Living's WAC on a requirement that it expend funds to purchase materials and improve public property. CP 93–94. Thus, SPU's demand is not meaningfully distinguishable from the demand in *Koontz* and is unquestionably subject to *Nollan* and *Dolan*. *Koontz*, 570 U.S. at 608, 619.

B. Courts Regularly Hold Monetary Exactions Subject to *Nollan/Dolan* Were Imposed to Fund Infrastructure Improvements

Holding SPU's condition subject to the *Nollan/Dolan* doctrine does not "radically expand" the law, as Seattle complains. Opening Br. at 23. Exactions caselaw provides

numerous examples of courts holding permit conditions that demand that the owner fund offsite public infrastructure subject to *Nollan/Dolan*. The Ninth Circuit, for example, ruled that a permit condition requiring an owner to pay half the cost of a new offsite bridge, among other demands, was an unconstitutional exaction. *KOGAP Ent., Inc. v. City of Medford*, No. 24-5268, 2025 WL 3172310, at *1 (9th Cir. Nov. 13, 2025) (not reported). Similarly, in *Knight v. Metro. Gov't of Nashville & Davidson County*, the Sixth Circuit ruled that a sidewalk fee ordinance violated *Nollan/Dolan* where it demanded an applicant to pay for sidewalks that would be constructed several miles away from the subject property. 67 F.4th 816, 826 (6th Cir. 2023). And in *Alliance for Responsible Planning v. Taylor*, a California appellate court held that an ordinance that conditioned new development permits on a requirement that the owners address the impacts of other development by fully funding needed traffic infrastructure improvements violated *Nollan/Dolan* on its face. 63 Cal. App. 5th 1072, 1075–76 (2021).

The North Carolina Supreme Court's opinion in *Anderson Creek Partners, L.P. v. County of Harnett*, is in accord with those authorities. 382 N.C. 1, 876 S.E.2d 476 (2022). At issue was a county requirement that new residential development pay a one-time "capacity use" fees as a condition for obtaining the county's concurrence in the developer's application for water and sewer permits. *Id*. at 3. Aware that general financial obligations like user fees or taxes are generally not subject to the *Nollan/Dolan* doctrine, the Court considered what the fees actually did, rather than what they are called, to conclude that a condition requiring the applicant to "offset the costs to expand water … systems to accommodate development" is not a user fee, it is an exaction subject to *Nollan/Dolan*. *Id*. at 17–18 (a fee intended to "cover the cost of expanding the infrastructure of the water and sewer system to accommodate the new development … falls squarely within the definition of an 'impact fee'). Accordingly, the court remanded the case for the trial court to determine "the extent to which the challenged 'capacity use' fees, as applied to plaintiffs,

had an 'essential nexus' and 'rough proportionality' to the anticipated impact that plaintiffs' proposed developments would have on the County's water and sewer infrastructure." *Id*. at 42.

C. State Caselaw Does Not Limit the *Nollan/Dolan* Doctrine to Dedications of Land or Fees in Lieu

Seattle's insistence that state caselaw has limited the doctrine of unconstitutional conditions to conditions demanding a dedication of the owner's land or a fee in lieu is baseless. The single issue decided in *Church of Divine Earth v. City of Tacoma* was whether the owner was entitled to damages under RCW 64.40.020 where a trial court determined that a sidewalk condition violated *Nollan/Dolan*. *Church of Divine Earth*, 194 Wn.2d 132, 134, 449 P.3d 269 (2019). The Washington Supreme Court's observation that *Nollan/Dolan* "create a framework for analyzing the constitutionality of a permit condition involving an uncompensated land dedication" merely set the legal and factual background for its decision, which involved a land demand. *Id.* at 138. The Washington Supreme Court was not asked and did

not rule whether the doctrine is limited to conditions that demand a physical interest in the owner's property. *See id.*

Seattle's reliance on the unpublished Division III opinion in *Entel v. Asotin County* is perplexing because the conclusion that *Nollan/Dolan* didn't apply in that case turned on the court's determination that the fire road condition did not require the owner to convey property *to the public*. 30 Wn. App. 2d 1038, at *7 (2024) (finding that the "private secondary fire access road that would remain under the ownership and control of the owner"). Here, by contrast, Seattle has admitted that SPU's condition required Oom Living to dedicate its property, including the required pipes, fixtures, and improvements, to the public. CP 526, 598.

Seattle's reliance on *Kahuna Land Co. v. Spokane County*, is equally perplexing because that case didn't involve a *Nollan/Dolan* claim. 94 Wn. App. 836, 974 P.2d 1249 (1999). Instead, the owner in that case alleged that, when combined, the cost of complying with various permit conditions effected a total

taking of all economically viable use of the property.[20] *Id.* at 842. The Court rejected that claim based on its determination that the owner "can still develop the land, even if not to the extent it desires." *Id*. The Court explained that "record indicates there is access to the property and there may be uses for the land other than a development of single family residences. Thus, the property still has economic viability." *Id*.

Unable to provide any on-point authority, Seattle urges the Court to adopt the reasoning of a nonprecedential trial court decision ruling that the *Nollan/Dolan* doctrine applies only to "building permit" decisions that either "forbid construction" or "condition construction."[21] CP 910–911. That ruling, however, is contrary to binding caselaw from the U.S. Supreme Court, which instruct that the *Nollan/Dolan* framework broadly applies

[20] Regulatory taking cases turn on different tests and principles than the unconstitutional condition claim the trial court adjudicated here. *Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 537–38, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

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

"[w]hen the government conditions the grant of a benefit such as a permit, license, or registration." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 161, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021); *see also Koontz*, 570 U.S. at 606 ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

A building permit is just one example of a "government benefit" in the land use context. *See Dolan*, 512 U.S. at 377 (doctrine applied to conditioned building permit); *Sheetz*, 601 U.S. at 272 (same). A water hookup approval is another. *Anderson Creek Partners*, 876 S.E.2d at 504; *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (recognizing that denial of a water hookup may violate *Nollan*, depending on the facts of the case); *abrogated on other grounds by Lingle*, 544 U.S. at 548. Indeed, there are many other types of decisions affecting one's right to use her land—all of which are subject to the nexus and proportionality standards, if conditioned upon the dedication of

property to the public. *See*, *e.g.*, *Nollan v. California Coastal Comm'n*, 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 (grading permit); *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 688, 49 P.3d 860 (2002) (preliminary plat approval); *Sparks v. Douglas County.*, 127 Wn.2d 901, 904, 904 P.2d 738 (1995) (short plat); *Burton v. Clark County*, 91 Wn. App. 505, 508, 958 P.2d 343, 345 (1998) (short plat).

Even so, it is false for the City to assert that SPU is not conditioning Oom Living's right to build. SPU's Rule 30(b)(6) official confirmed that Oom Living "would not receive approval of a building permit to construct the residence on Lot Y unless and until they had an approved with contract Water Availability Certificate." CP 765. And per state law, the City will not issue Oom Living's building and occupancy permits without an approved WAC. RCW 19.27.097. Thus, SPU's Rule (30)(b)(6) official confirmed that "the building permit is conditioned on meeting the requirements of the Water Availability Certificate."

CP 766. There is simply no legal basis for Seattle's request to hold the conditioned WAC categorically exempt from the doctrine. *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.").

D. Out of Jurisdiction Caselaw Does Not Limit *Nollan/Dolan*'s Application to the Conditioned WAC

The County's citation to out-of-jurisdiction caselaw is equally misplaced. At issue in *Ballinger v. City of Oakland* was whether an ordinance that imposed a general financial obligation on a private commercial transaction was subject to review under *Nollan* and *Dolan*—where there was *no permit requirement and no permit condition*. 24 F.4th 1287, 1291 (9th Cir. 2022); *see also id*. at 1295 ("We hold, as other circuits have, that in certain circumstances not argued here, money can be the subject of a taking" when "the relinquishment of funds [is] linked to a specific, identifiable property interest.") (citing *Koontz*, 570 U.S.

at 614). Similarly, *California Bldg. Indus. Assn. v. City of San Jose*, held that *Nollan* and *Dolan* did not apply to a requirement that developers include low-income housing in multi-home developments because the ordinance would impose a deed restriction on future owners only—no such condition was imposed on the developer. 61 Cal. 4th 435, 461, 351 P.3d 974 (2015). Nor did the condition require the developer "to pay any money to the public." *Id*. And in *Housing First Minnesota v. City of Corcoran*, a Minnesota appellate court merely determined that the city's permit processing fees constituted user fees (because they repay the government for its service) and are not subject to *Nollan/Dolan*. No. A23-1049, 2024 WL 1244047, at *5 (Minn. Ct. App. June 26, 2024) (nonprecedential). The district court opinion in *2910 Georgia Ave. LLC v. D.C.* dismissed the owner's claim under a now-repudiated rule that had held legislatively mandated exactions categorically exempt from review under *Nollan/Dolan*. 234 F. Supp. 3d 281, 305 (D.D.C. 2017); *abrogated by Sheetz*, 601 U.S. at 280.

CONCLUSION

For the foregoing reasons, Respondent Oom Living requests that the Court affirm the trial court's order on cross-motions for summary judgment. And because the City has stipulated that an affirmance will establish its liability under 42 U.S.C § 1983, this Court should award Oom Living attorneys' fees on appeal pursuant to 42 U.S.C. § 1988.

DATED: January 26, 2026.

Pursuant to RAP 18.17(b), we certify that this brief contains 11,773 words.

Respectfully submitted,

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DECLARATION OF ELECTRONIC SERVICE

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

DATED: January 26, 2026.

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