No. 24-5268

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KOGAP ENTERPRISES, INC.,

Plaintiff – Appellant,

v.

CITY OF MEDFORD,

Defendant – Appellee.

On Appeal from the United States District Court
for the District of Oregon
No. 1:22-cv-01468-CL
Honorable Mark D. Clarke, Magistrate Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant KOGAP Enterprises, Inc. is a family-owned corporation organized under the laws of the State of Oregon. It has no parent corporation and issues no shares.

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INTRODUCTION

The City of Medford wants to take a portion of KOGAP Enterprises' property in order to connect an adjacent dead-end rural road to a street on the other side of the property. But the City does not want to pay for it. So instead, the City conditioned approval of revisions to a planned unit development (PUD) on a requirement that KOGAP dedicate vehicular and pedestrian rights-of-way across its property, construct a new road, and promise to fund half the cost of building a bridge to connect the new road to an existing dead-end road (together, the "Myers Lane exaction"). This appeal asks whether the permit condition violates the "essential nexus" and "rough proportionality" tests set out by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

It does.

The *Nollan/Dolan* doctrine prohibits the government from conditioning a land-use approval on a requirement that the applicant dedicate property and/or pay for improvements to public infrastructure unless the government shows that its demand is sufficiently related in nature and extent to an identified, adverse impact of the property's proposed use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013). In this way, the nexus and rough proportionality tests prevent a permit applicant from being forced to "give up more than is necessary to

mitigate harms resulting from new development." *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 276 (2024). Medford has not met this heightened scrutiny burden because the Myers Lane exaction seeks to address the adverse public impacts of an *existing* dead-end street—a condition that was neither created nor exacerbated by KOGAP's proposed use of its adjacent property. Unrefuted testimony establishes that KOGAP's PUD revisions would retain the same street and block configurations previously approved by the City and would result in no increase in traffic. The City, moreover, made no attempt to show that the exaction is proportionate to the impacts of KOGAP's proposed revisions.

The district court's order granting summary judgment to the City, and denying KOGAP's cross-motion for summary judgment, diverged from binding precedents of the U.S. Supreme Court and conflicts with decisions of other courts. Medford's desire to improve its existing road conditions, while laudable, is not a constitutionally sufficient basis to shift the cost of eliminating the dead-end to KOGAP. *Nollan*, 483 U.S. at 841 (government's belief that exaction will serve public interest "does not establish that the [landowner] alone can be compelled to contribute to its realization"). The fact that it may be difficult for a city to establish nexus and proportionality is not a basis to relieve it of its heightened scrutiny burden—nor is it "fair[]" or "reasonable[]" to do so. ER-21. In the absence of such proof, the City's demand that KOGAP dedicate property and pay to connect Myers

Lane can only be understood as "the obtaining of property to serve some valid government purpose but without payment of compensation." *Nollan*, 483 U.S. at 837. The Court should reverse the district court's judgment and hold that the exaction violates the doctrine of unconstitutional conditions and remand the matter for a determination of damages and attorney's fees and costs as required by Oregon Revised Statutes (ORS) § 197.796(5). Alternatively, should the Court find a genuine question of material fact, it should reverse the district court's order granting summary judgment in favor of the City and allow the claim to proceed to trial..

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1331, the federal district court had subject matter jurisdiction over this dispute which raises a question under the United States Constitution. On August 7, 2024, that court issued an order granting summary judgment to the City of Medford and entered final judgment. Appellants filed a timely notice of appeal on August 24, 2024, under Rule 4 of the Federal Rules of Appellate Procedure. This Court granted an extension on October 28, 2024, and again on December 16, 2024, setting the deadline for filing the opening brief on appeal as December 30, 2024. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. When the government's only support for an exaction it demands as a condition of a development permit is its general benefits, does it fail *Nollan*'s nexus requirement that conditions must mitigate impacts caused by the proposed use?

2. When the government is unable to quantify the impacts of a proposed development to evaluate whether an exaction is proportional, does it fail *Dolan* to substitute other inquiries like the general benefits flowing from the exaction, the cumulative impacts of future development, and the size of exactions demanded of other owners?

3. If not, did the district court err in granting summary judgment to Medford where genuine issues of material fact exist as to whether the City satisfied the "essential nexus" or "rough proportionality" tests?

STATEMENT OF THE CASE

A. Background on the Myers Lane Extension

Due to its historic residential development patterns, the City of Medford is faced with many disconnected and dead-end roads.[1] While these "streets can be desirable to residents because they can limit traffic speeds and volumes on local streets," the City Council determined that the existing network of "cul-de-sacs and dead end streets result[s] in longer trip distances, increased reliance on arterials for local trips, and limited options for people to walk and bike to the places they want to go."[2] Thus, in 2018, the City Council adopted by ordinance a Transportation System Plan, which recognized the general public's interest in remedying the problems arising from these disconnected streets by identifying areas "where there is a lack of connectivity in an existing network that needs to be addressed by the City or through future development."[3]

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[1] City of Medford, Transportation System Plan 2018-2038, at 137 (Addendum (Add.) at 3) (https://tinyurl.com/y5e93ndz) (last visited, Dec. 16, 2024). The City's nexus analysis states that the Myers Lane exaction advanced goals identified by this document. ER-123. Because the document was not reproduced in the record, KOGAP requests that this Court take judicial notice of the Plan. *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)). Excerpts of the Transportation System Plan are attached as Add.-1–6.

[2] *Id*.

[3] *Id.*

Myers Lane is one such road. The segment of Myers Lane located south of Garfield Street and immediately west of KOGAP's property is an unimproved road that winds through a rural area already developed with eleven homes, and which terminates in a dead-end at the border of KOGAP's property on Hansen Creek. ER-107, 209. In 2021, the City Council adopted an urbanization plan that envisioned extending Myers Lane westward of the rural neighborhood to create a new commercial road paralleling Garfield Street and serving anticipated future development to the west and south of KOGAP's PUD. ER-109. Thereafter, in 2022, the City Council amended its Transportation System Plan to specifically identify KOGAP's property as a location for "potential future local street connections" like the Myers Lane extension.[4] But the City Council did not want the public to pay for the rights-of-way or the improvements necessary to extend Meyers Lane, stating in the Plan that development would do so.[5] Indeed, the Plan included the Myers Lane extension among the "streets to be constructed by future development and extension of existing stub end streets" in order "to improve connectivity for all modes of transportation,"[6] and stated that the connection would not "require City participation to complete."[7]

[4] Add.-3.
[5] *Id.*
[6] *Id.*
[7] Add.-3, 5.

The City's proposed extension on KOGAP's property is illustrated in red in the following map:

ER-39. KOGAP's PUD is bounded by the green dashed line.

B. KOGAP and the Stewart Meadows PUD

KOGAP Enterprises is a family owned and operated business that ran a sawmill for decades on the southern outskirts of Medford. When changes in the timber industry prompted the mill's closure, KOGAP decided to develop its former sawmill site into a 121-acre development called Stewart Meadows Village. ER-47–50. In 2007, Medford issued its preliminary approval of KOGAP's PUD, *id.*, which

is a flexible zoning device that allows for "creative and imaginative urban development that would otherwise not be possible under the strict requirements of this code." Medford Land Development Code (MLDC) § 10.190(1).

In the years since that approval, KOGAP sought and obtained the City's approval on numerous revisions and other land use applications that were required as part of the phased development process or prompted by changes to the development plan. ER-65, 71–72. These approvals included requests for design changes, zoning swaps, lot adjustments, adding property to the PUD, and other similar items. *Id*. The current plan contemplates a mixed residential and commercial development of 151 lots in 23 phases, including retail space, office space, single family residences, and multi-family housing. ER-65–71; ER-43–57.

Before discussing the subject application and challenged exaction, three preceding decisions provide relevant context.

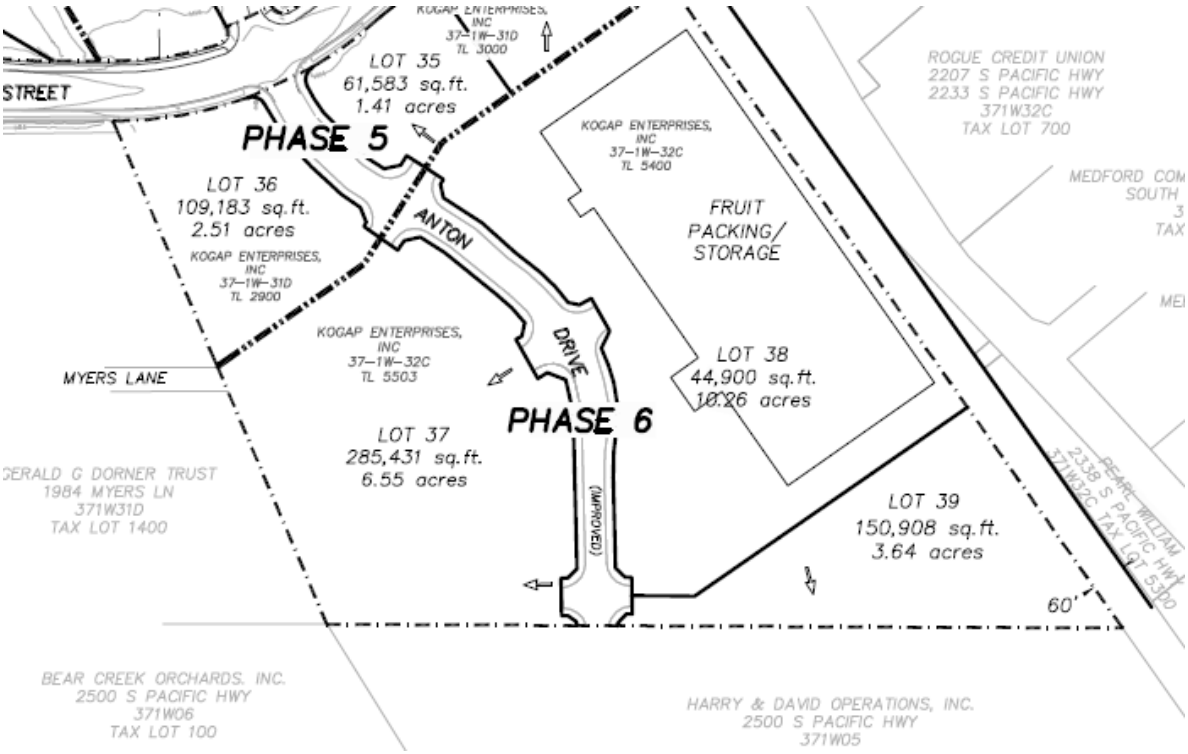
C. The City Determined That the PUD Would Require No More Street Dedications to Address Anticipated Traffic Impacts

In 2017, Medford approved a PUD revision request involving modifications not at issue here. ER-263–272. As part of its review, the City considered a comprehensive traffic impact analysis and approved the revision in a quasi-judicial proceeding with a determination that "[n]o additional right-of-way is required.… no additional public improvements are required." ER-264–265. Critically, the approval did not designate the Myers Lane extension among the minor improvements needed

to address the PUD's traffic impacts. ER-266. The City's decision on the 2017 applications constituted its most recent and final determination regarding the anticipated traffic impacts of the master plan development.

D. The City Determined That the Myers Lane Exaction Would Likely Fail a *Nollan/Dolan* Challenge

Not long after the City determined that no future rights-of-way would be required, and after the City updated its Traffic System Plan in 2018, KOGAP applied for a tentative plat approval which recognized two existing lots in a 9.06-acre parcel at the PUD's southern and western boundaries, south of Garfield Street and east of Anton Drive: lots 36 and 37. ER-252–257.



ER-256 (close up).

Medford's public works department determined that the proposed plat—which would not make any alterations to existing block lengths and street configuration—would exceed the maximum block length generally allowed under Medford's code by between 57 feet and 245 feet, depending on how the block is measured.[8] ER-112 (estimating that, at most, the block would exceed the maximum by 57 feet); ER-118–119. The code, however, gives the planning commission discretion to allow blocks that are larger than otherwise permitted. ER-79; *see also* MLDC § 10.192(2)(e) (providing that "Streets within PUDs ... may exceed maximum block length and perimeter standards provided in Section 10.426(4)(a))." Nonetheless, public works recommended that, as a condition of approval, KOGAP dedicate a right-of-way between lots 36 and 37, and that it pay to construct a 350-foot extension of Myers Lane along with a bridge over Hansen Creek, thereby connecting the existing dead-end of Myers Lane to Anton Drive. ER-85; 247–250.

Public works staff insisted that the exaction was necessary to comply with the goals of the City's maximum block length code provision. ER-247–249 (citing MLDC § 10.426). Critically, like the Transportation System Plan (Add.-3), the

[8] A public works staff member measured the block length at 1,185 feet without the Myers Lane extension. ER-118–119. In general, the city code limits blocks to 940 feet. MLDC § 10.426(4)(a)-(b). However, the maximum block length in the commercial zone is 1,128 feet due to the ability to extend 20% per MLDC § 10.426(4)(c). The City never determined which provision applied to the subject commercial and industrial zoned properties.

purpose of that code provision is not to mitigate development impacts, but instead to meet "the public need for promoting connectivity and a balanced transportation system by establishing block standards to ensure that streets are constructed or extended in projections that maintain their function, provide accessibility, and continue an orderly pattern of streets and blocks." ER-14. Accordingly, public works did not perform any impact studies (traffic or otherwise), nor did it identify or consider any project impacts when imposing the condition. *See* ER-224–235. Instead, public works simply rested on the conclusion that requiring KOGAP to dedicate the rights-of-way and to construct the road extension across its property would "help preserve the higher order street network" and, as a result, would benefit a "significant amount of developable land … south and west of Stewart Meadows Village PUD." ER-249.

KOGAP estimated that it would cost approximately $2 million to satisfy the condition and objected on *Nollan/Dolan* grounds. ER-258. Specifically, KOGAP argued that the exaction did not seek project-impact mitigation but instead sought to satisfy the generalized and preexisting community need for "higher order streets," and furthermore sought to address the anticipated needs of other future development, not the negligible—*if any*—impacts of KOGAP's proposed development. ER-260–262.

The Medford city attorney responded by recommending that the condition be withdrawn based on his conclusion that "imposing any condition to connect the applicant's property to the Myers Lane right-of-way may not survive a Nollan/Dolan challenge." ER-246. On further review, the City's planning commission agreed that the condition "was an unlawful exaction." ER-127. Thus, in 2020, the City approved the tentative plat—including the oversized block—without the Myers Lane exaction. ER-246.

But the City was not done with its demand for the property and construction of a street extension.

E. The City Approves Fast-Food Restaurants on the Eastern Boundary of the PUD

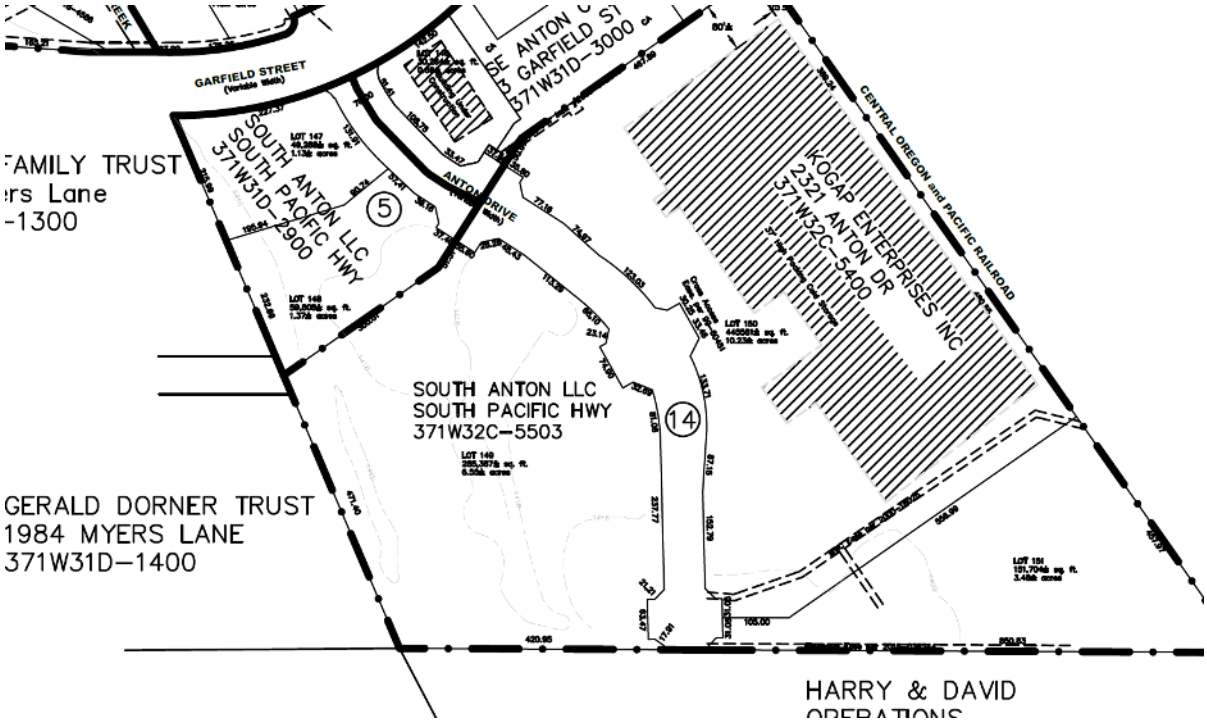
In 2021, KOGAP received a *de minimis* approval to separate one strip-style mixed retail and dine-in restaurants to one strip-style retail with a drive-through restaurant and 3 separate drive-through restaurants on a parcel on Garfield Street near Highway 99 to three fast-food restaurants with drive through lanes with no determination that the change of plans would result in any additional traffic impacts. ER-229–231. A few months later, the City approved the architectural plans for one of the restaurants without the imposition of any exactions for any claimed traffic or block length impacts. ER-215–227.

F. The City Renews Its Demand for the Myers Lane Exaction

On March 7, 2022, KOGAP submitted the subject applications to revise the preliminary PUD plan. The applications included requests to (1) modestly increase the number of residential units in an area north of Garfield street while reducing the size of proposed retail development and (2) subdivide the same 9.06-acre parcel at issue in the 2020 tentative plat from the two previously approved lots (former lots 36 and 37) into three parcels re-designated as lots 147, 148, and 149.[9] ER-144–145, 164–206, 213 (map). Critically, the newly proposed lots 147, 148, and 149 would maintain the same block dimensions that Medford approved in 2020 and overall, the development would retain the same street layout approved in the 2017 revision.[10] ER-159.

[9] The application also included a zone swap, which is not at issue here: Medford did not contend that the zone swap application was a basis for the exactions, and the zone swap was ancillary and complimentary to the changes sought in the PUD revision application.

[10] The 2017 approval, discussed above, identified the traffic impacts for the PUD properties based on the number of lots created and the zone changes. The applications at issue here merely moved boundaries and swapped the locations of the zones, which is a significant reason why there were no new trips in the approval.



ER-213.

Nevertheless, Medford's public works department renewed its demand for the Myers Lane exaction, conditioning approval on a requirement that KOGAP (1) dedicate public rights-of-way between lots 148 and 149, running from Anton Drive to the PUD's western boundary at Hansen Creek, (2) construct a public road on the right-of-way, and (3) pay 50% of the cost of building a bridge over Hansen Creek—a substantially similar exaction to the one that Medford abandoned in its 2020 tentative plat approval. ER-123–124; *see also* ER-95.

1. KOGAP objects to the exaction as violating *Nollan* and *Dolan*

KOGAP objected to the City's reimposition of an exaction it had withdrawn as unconstitutional less than two years earlier. To support its objection, KOGAP's

leadership recalculated the cost of satisfying the demand and roughly estimated that the Myers Lane exaction would cost at least $700,000 based the lowest potential expense of building an access driveway that would provide minimal access across KOGAP's property. ER-120. And included in that figure was the estimate of $150,000 to fund half of the bridge also reflected current prices at the minimum standard to accommodate the connection to the access driveway. *Id*. KOGAP advised that, if the City required the right-of-way to be developed as a high order, residential street section, the cost would be significantly more. *Id*.

KOGAP also determined that the demanded right-of-way would impair the function and value of its proposed development by (1) reducing the size of a previously approved restaurant on lot 148, (2) eliminating a vegetated buffer between the restaurant and a neighboring industrial development, and (3) reducing the size of the parking and semi-truck maneuvering areas on the approved industrial development planned on lot 149. ER-120. A neighboring business offered the additional concern that the Myers Lane extension would direct residential vehicle traffic, bicycles, and pedestrians into a busy industrial area that generates a significant amount of heavy truck traffic. ER-134. These impacts to proposed and existing development would worsen depending on what type of road the City ultimately demands. ER-143 (the estimated burden on KOGAP and neighbors

"assumes that an access driveway is constructed as opposed to a residential street section…").

In support of its objection, KOGAP submitted the only traffic impact study evaluating the 2022 applications. ER-102–107. Addressing the proposed changes to the PUD, the study first concluded that there is no logical reason why residential development north of Garfield Street would divert traffic southward to the area, let alone that any such trips would use the Myers Lane extension. ER-107. Second, the study determined that the proposed changes to the PUD would result in "no increase in impacts from the development to the adjacent roadway system." ER-107, *see also* ER-102 (determining a "net increase of 0 trips to the development over the number of trips that have been previously approved."). And third, addressing the previously approved fast-food restaurants on Garfield Street, the study determined that those uses would generate significantly less local traffic than the previously planned strip mall due to the nature of the fast-food business and their location just off Highway 99. ER-106. Thus, the study concluded that the Myers Lane extension was not needed to address "the levels of traffic generated by Stewart Meadows PUD." ER-107.

The traffic study also determined that KOGAP's entire development would not benefit from the Myers Lane extension. Based on existing conditions, the study estimated that there would be only 40 daily trips on the newly created road extension,

including only four during the evening peak hour, most of which would simply serve the rural residential properties to the west. ER-107. That is because the remainder of Myers Lane is a narrow, unimproved road that runs through a neighborhood with on-street parking and shared bike lanes, and which is intersected by several driveways. *Id*. Even if the area to the west and south of the PUD was developed in the future, there would still be very few trips to the portion of Stewart Meadows Village south of Garfield Street. *Id*. (estimating an additional 10 evening trips per day with a full build out); *see also* ER-96–101 (observing that several existing roadways would provide more direct and faster access to the undeveloped land to the west and south of the PUD).

Despite these several concerns, the City never specified exactly what type of road would be required of KOGAP in the final order. Instead, the relevant condition reads as follows:

> The applicant shall extend Myers Lane right-of-way that abuts to the westerly property line of the development in a way that meets block and length requirements of MLDC § 10.426(4)(a) AND sign a deferred improvement agreement for 50% of the cost of a future crossing of Hansen Creek in accordance with MLDC § 10.432. The remaining 50% of the crossing will be paid by future development west of Hansen Creek. MLDC § 10.432 provides options for the street extension such as a public street, a private street built to city standards or an interior access road.

ER-82.

2. The City's nexus and proportionality justifications

The City responded to KOGAP's objection by emphasizing that the exaction was not intended to mitigate traffic impacts. *See* ER-84–87. Instead, the City stated that the purpose of the exaction was to meet to public's interest in the "development of a balanced transportation system addressing all modes of travel," as set out by its block length code provision and its Transportation System Plan. ER-132; *see also* ER-123. Thus, the City disregarded KOGAP's traffic analysis, writing that "regardless" of the report's accuracy, Medford's code on block and perimeter lengths does not depend on such data as the "number of trips" attributable to the new development because traffic impacts are not "one of the criterion [sic] included in MLDC § 10.426 [the block length provision]." ER-87. The City, therefore, did not conduct its own impact study (traffic or otherwise) or offer any evidence contesting the traffic study's major conclusions discussed above. *See* ER-30–31 (City attorney explaining that "The revision before Council does not increase total number of trips for the PUD, but does change their distribution through the development...." and that City "staff's interpretation is that this revision does not necessary [sic] create new trips….").

The City's justifications for the Myers Lane exaction are memorialized in a staff report from its public works department. ER-130–136; *see also* ER-89 (Commission adopting staff's analysis). But rather than addressing KOGAP's

objections—which were based on the "essential nexus" and "rough proportionality tests" as set out by *Nollan* and *Dolan*—City staff prepared a report addressing the substantively different standards codified in Section 10.668 of Medford's city code. ER-131–132. In justifying the exaction, the City also went beyond the limits of its code, which states that review of revision requests "shall be strictly limited to the specific nature and magnitude of the *proposed revision*", MLDC § 10.198(1)(c) (emphasis added), by considering the impacts of earlier proposals, like the fast-food restaurants that were previously approved. *See* ER-84 (City determined that the drive-through restaurants previously approved could result in more "auto-oriented uses").

a. The City's Nexus Analysis

Even though *Nolan* requires the City to identify the connection between specific impacts of KOGAP's development and the exaction, Section 10.668 of Medford's land development code required only that there is a logical connection "between the exaction and a legitimate government purpose." ER-132. Thus, the City's nexus analysis simply stated that "the purpose for these dedications and improvements are found throughout the Medford Code, the Medford Transportation System Plan, and Statewide Planning Rule, and [is] supported by sound public policy" because the exaction could serve several public interests, including development of a balanced transportation system and providing a location where

sewer, water, and storm drains may be located. *Id*. That is the *entire* analysis.[11] The staff report did not address *Nollan*'s heightened scrutiny "essential nexus" standard, which requires the City to go beyond the code's minimal "advances a legitimate government interest" standard to identify the specific adverse impacts that the proposed development will have on the asserted government interest. *Nollan*, 483 U.S. at 837.

The City asserted a different nexus in its subsequent proportionality analysis. There, despite having explained that the exaction was not intended to mitigate traffic impacts and having acknowledged that the 2022 revision would result in no additional vehicle trips, the City incongruously offered that patrons and employees of the previously approved drive-through fast-food restaurants on Garfield Street would use the transportation system to access those establishments which would result in "additional traffic of all modes of travel." ER-136. In another memo, the City asserted that the restaurants would create more "auto-oriented uses" than the earlier plan to develop dine-in style strip mall restaurants. ER-127. The City, however, offered no evidence supporting either claim. ER-130–136.

[11] Elsewhere, the staff report had erroneously stated that the 2022 applications would result in 634 additional PM vehicle trips to the area near the Myers Lane extension. ER-133. That number, however, was based on an early traffic study and was fully mitigated in prior approvals. ER-115. Consequently, the City later confirmed that the revision would result in no additional vehicle trips, and did not advance that purported impact in its briefing to the district court.

b. The City's Proportionality Analysis

The City's proportionality determination did not meaningfully evaluate the size and cost of the Myers Lane exaction against any identified development impacts. ER-132–136. Instead, the staff report began by listing several generalized benefits that it felt *could* flow to KOGAP from the Myers Lane extension, including "improving vehicular, bicycle, and pedestrian access on the South side of Garfield," "creating … another full movement intersection" to aid traffic flow, "decreasing public safety response times for emergency services by providing an alternative route into the development," and "increased property values, intensification of use, as well as connections to municipal services and the transportation network." ER-132. The City did not quantify these purported benefits, let alone explain how they factored into its analysis. ER-132–136.

Turning thereafter to the burden imposed on KOGAP, the City asserted that the cost of dedicating the rights-of-way and the construction of a road would be negligible because KOGAP had already planned to spend a significant amount of money to develop that portion of property as a parking lot. ER-135. According to the staff report, "any increase in cost to comply with public or private street requirements is incremental over the cost of the pavement of the parking lot already proposed." *Id*. Based on that, the City determined that most of the costs associated with the dedication and road construction were "already contemplated by the

applicant's site plan." *Id*. The only outstanding cost it considered when determining the burden on KOGAP, was the $150,000 earmarked for half the cost of building a bridge over Hansen Creek. *Id*. Thus, the City concluded that the exaction would impose a minimal burden on KOGAP. *Id*.

The City, however, offered no evidence to support its vague conclusion that the exaction was not "costly." ER-135. The staff report did not address KOGAP's claim that the roadway segment would likely cost more than $700,000 and the dedication of a right-of-way would harm its property's value and function—let alone, the traffic engineer's conclusion that the Myers Lane extension would not benefit the development. ER-107. Instead, the City offered the conclusory statement that "[t]he additional traffic of all modes of travel generated by this proposed development supports the dedication and improvements for all modes of travel and utilities." ER-136.

The City did not, however, support that claim with an individualized determination showing that the Myers Lane exaction was roughly proportionate to any impacts that KOGAP's proposed development would have on the existing road network as is required by *Dolan*'s proportionality test. *Dolan*, 512 U.S. at 391. Instead, the City sought to establish that the burden on KOGAP was proportionate by comparing the size of the Myers Lane exaction to the size of exactions it had

demanded only from some select other developers who did not challenge the constitutionality of the City's exactions.[12] ER-133–134.

KOGAP objected that there was no lawful basis for that comparative analysis. ER-115. And even if it was legitimate, KOGAP objected that the City's reliance on other exactions lacked an evidentiary foundation because the City failed to disclose the details of the other exactions, including whether they were challenged, the impacts they sought to mitigate, the character of the proposed development, or any other project- and site-specific conditions. *Id*. The City, however, did not to respond to KOGAP's objections, opting instead to assume that each comparable exaction had satisfied the proportionality test, and therefore that any similar demand for money and property must also be roughly proportionate. *See* ER-86–88.

[12] To do so, the City calculated the area of the Myers Lane extension (480,375 sq. ft. of land and 274,500 sq. ft. of improvements) as a fraction of the PUD, not just the 9-acre area subject to subdivision. ER-133. This decision resulted in a determination that the Myers Lane exaction was imposed at a ratio of 4,593 sq. ft. of land per acre and 2,624 sq. ft. of road improvements per acre. *Id*. The City then compared the Myers Lane ratios to the ratios of exactions imposed on other industrial developments to mitigate for their traffic impacts. The City's comparison analysis considered only the square footage of the demanded property and the cost of building a road on that property. It did not consider the additional expense of paying half the cost of building a bridge. *See id*.

c. The City's Alternative Justifications

Although the City Council adopted the nexus and proportionality analysis set out in the public works staff report as the stated basis for the Myers Lane exaction, the City's record contains several other attempts to justify the exaction. A planning staff memo, for example, stated that the exaction was required to bring the existing block length into compliance with the code and, as a result, would benefit the general public, other existing properties, and anticipated future development. ER-84. Specifically, staff stated that the Myers Lane exaction was justified because (1) "local street connections help preserve the capacity of the higher order street network," (2) "there is a significant amount of developable land … south and west of the Stewart Meadows Village PUD," (3) the City's urbanization plan anticipated the extension of Myers Lane and its improvement to a commercial road, and (4) the Myers Lane extension could facilitate vehicular, cyclist, and pedestrian access the signalized intersection of Anton Drive and Garfield Street. ER-84–85.

During the City Council's public hearing, the City's transportation manager explained how the City arrived at the conclusion that the revisions could result in "more auto-oriented uses" on Myers Lane even though he acknowledged that "this revision does not increase trips." ER-33. The manager offered that, although the fast-food restaurants would be located a few blocks away "in the southeast corner of the development, north of Garfield," those restaurants *could* attract more cars onto

Myers Lane "***If*** this connection is made ***and*** houses are built west of that area". *Id*. (emphasis added). The manager continued, suggesting that, if that offsite development occurs, then "***those trips could*** use the proposed [Myers Lane] connection to cross Garfield Street at a signalized intersection and access [the fast-food restaurants]." *Id*. (emphasis added). The City, once again, offered no evidence supporting its claims about the traffic impacts of offsite future development, nor did it make any attempt to apportion the burdens imposed by the Meyers Lane exaction between those other developments and KOGAP. *Id*.

On July 14, 2022, Medford's planning commission granted the revision but imposed the Myers Lane exaction as a condition over KOGAP's objection. ER-89, 92–93. In doing so, the planning commission adopted the nexus and proportionality justifications as memorialized in the staff reports. *Id*. On July 28, 2022, KOGAP filed an administrative appeal of the decision to Medford's City Council, arguing once again that the exaction violated *Nollan* and *Dolan*. ER-44. The council affirmed the planning commission based on the justifications contained in the staff reports. ER-51.

G. Procedural History

KOGAP filed a complaint in Oregon state court on August 29, 2022, alleging that the Myers Lane exaction violated the doctrine of unconstitutional conditions as set out by *Nollan*, *Dolan*, and *Koontz*. ER-277 (Doc. 1-1). The City of Medford

removed the case to the U.S. District Court for the District of Oregon on September 29, 2022. *Id.* (Doc. 1). Pursuant to a stipulation by the parties, the district court entered an order bifurcating the case as to liability and damages and adopting the administrative record in lieu of discovery. ER-278 (Doc. 21). Thereafter, the parties filed cross-motions for summary judgment on the *Nollan/Dolan* claim. ER-280 (*see* Docs. 36, 37).

The district court granted summary judgment in favor of the City and denied KOGAP's motion for summary judgment. ER-7–23. The court began its analysis by identifying the City's interest in this case as "the public need for promoting connectivity and a balanced transportation system by establishing block standards to ensure that streets are constructed or extended in projections that maintain their function, provide accessibility, and continue an orderly pattern of streets and blocks." ER-14 (summarizing the government interest as the "functional, accessible, and orderly patterns of streets and blocks.").

Speaking to nexus, the court determined that "the condition to extend Myers Lane would bring the 2022 Application into compliance with the [block length provision of the] City Code, and it would remedy the legitimate government interests of local street connectivity impeded by the development's noncompliance." ER-18 (noting, however, that compliance with a code provision alone cannot satisfy nexus. ER-14)). Thus, the court seized on the City's claim that the revision would result in

"more auto-oriented uses," concluding that "the zoning swap and the drive-through restaurants" as well as "continued non-compliance with the City Code would more severely impede the governmental interest identified in MLDC § 10.426 [the block length provision]." ER-18–19.

Turning to proportionality, the district court concluded that the City's failure to engage in an individualized determination whether the Myer's Lane exaction was proportionate to the impacts of the proposed revisions was not fatal to the property demand. Instead, the court found that, given the "difficulty in demonstrating rough proportionality" and in the "spirit of fairness," it would be "reasonable[]" for the City to make its proportionality determination based on its consideration of other factors, *see* ER-21, including the fact that that Medford had determined (1) that the benefits of the exaction outweighed the burdens imposed on KOGAP, (2) the exaction would mitigate cumulative impacts of nearby future development, and (3) that the Myers Lane exaction was comparable in size to exactions demanded from other developments. ER-19–22. The court, thereafter, concluded that Medford's consideration of those factors satisfied proportionality and upheld the exaction, granting summary judgment in favor of the City and denying KOGAP's cross-motion for summary judgment. ER-22, 23.

KOGAP timely appealed. ER-273.

STANDARD OF REVIEW

A district court's decision on cross-motions for summary judgment is reviewed de novo. *See Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). The issues presented on appeal ask whether the City's condition requiring KOGAP to construct and dedicate pedestrian and roadway extensions and a bridge was an unlawful exaction in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. The determination of whether a taking has occurred is "a question of law with factual underpinnings," *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). This Court reviews de novo the district court's conclusion that the exaction did not violate the unconstitutional conditions doctrine. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). It also engages in de novo review of the underlying facts, "viewing the evidence in the light most favorable to the losing party, to determine if the prevailing party was clearly entitled to judgment as a matter of law." *Morrison v. Char*, 797 F.2d 752, 755 (9th Cir. 1986) (citation omitted).

The burden of proof in this case is established by Oregon law and U.S. Supreme Court jurisprudence. KOGAP's complaint was filed under the authority of ORS § 197.796, which allows a land use applicant to "accept" an unconstitutional condition and challenge it in court. *See Brown v. City of Medford*, 251 Or. App. 42, 46, 283 P.3d 367, 369 (2012). ORS § 197.796 specifically incorporates the Fifth

Amendment and places the heightened scrutiny burden of proof establishing constitutional compliance on the City: "In any challenge to a condition of approval that is subject to the Takings Clause of the Fifth Amendment to the United States Constitution, the local government shall have the burden of demonstrating compliance with the constitutional requirements for imposing the condition." ORS § 197.796(4); *see also Dolan*, 512 U.S. at 391 (government bears the burden of demonstrating nexus and proportionality); *see also id*. n.8 (explaining that, under the doctrine of unconstitutional conditions, the government is not entitled to deference).

SUMMARY OF THE ARGUMENT

The U.S. Supreme Court's exactions cases hold that government may not condition a land-use approval on a requirement that the applicant dedicate property to a public use unless the government shows that its demand is sufficiently related in nature and extent to an identified, adverse impact of the property's proposed use. *Koontz*, 570 U.S. at 604–05. To show that an exaction does not exceed this impact-mitigation standard, the Court requires the government to make an individualized determination that the property demand "is related both in *nature* and *extent* to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (emphasis added). Contrary to the district court's opinion below, it is not difficult for the government to make this showing—particularly if the property demand is truly imposed for mitigation purposes. *See F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198,

207–208 (6th Cir. 2021) (reviewing decades of case law to note the "ease" with which mitigation requirements can satisfy the individualized determination requirement).

Medford failed to carry this burden. It provided no evidence of any specific development impact, and it offered no explanation why the previously approved block length—which would exist with or without KOGAP's subdivision application—necessitated the dedication of at least $700,000 or more of real property and money. Instead, it defended, and the district court accepted, nexus on the claim that the public's interest in functional and orderly streets justified the property demand. And it defended the proportionality of its exactions on three wholly irrelevant grounds: first, that the benefits flowing from the exaction exceed the burdens imposed on KOGAP; second, that the exaction was necessary to compensate for the potential impacts of possible future offsite developments; and third, that the City had levied similar exactions on similarly situated developers.

The City's failure to identify a specific impact that the development will have on the dead-end at Myers Lane, and its inability to show that its exaction is proportionate to any development impacts, compels a conclusion that the demand is unconstitutional. There is nothing "fair[]" or "reasonable[]" about relieving the government of its burden to satisfy a test (ER-21) that is designed "to bar Government from forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole." *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The City cannot meet its constitutional burden and its property demand must be invalidated.

Even if this Court approved of the City's alternative ways for determining nexus and proportionality, the district court's summary judgment order should still be reversed and the matter remanded due to the existence of several genuine issues of material fact, including whether the revision will result in any traffic impacts, and whether the cost of the exaction is commensurate with that impact.

ARGUMENT

The City certainly has wide latitude in deciding that "functional and orderly patterns of streets and blocks," serves the public interest. But "there are outer limits to how this may be done." *Dolan*, 512 U.S. at 396 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

The doctrine of unconstitutional conditions enforces an outer limit on state and local government authority by forbidding the government from conditioning the approval of a permit or license upon the surrender of a right secured by the U.S. Constitution. *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926) ("[T]he power of the state is not unlimited; and one of the limitations is that it may

not impose conditions which require relinquishment of constitutional rights."). In the land-use permitting context, the doctrine holds that the government may require a landowner to dedicate property to a public use *only* when it is shown to be sufficiently necessary to mitigate adverse public impacts of a proposed development. The government may not use the permit process to coerce landowners into giving property to the public that it would otherwise have to pay for. *Koontz*, 570 U.S. at 604–06; *Dolan*, 512 U.S. at 385 ("[G]overnment 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 benefit [that] has little or no relationship to the property."). The nexus and proportionality tests ensure that individual landowners are not singled out during the permitting process to bear the burdens of public policies that should be distributed among the public as a whole. *Dolan*, 512 U.S. at 384 (quoting *Armstrong*, 364 U.S. at 49).

Faithful application of those tests is essential for land-use permit applicants, who "are especially vulnerable to the type of coercion 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. This is particularly true when the government identifies a public need in advance of a permit application, as the City has done here. The unconstitutional conditions doctrine ensures that government does not

opportunistically tap permit applicants to satisfy preexisting public needs. Indeed, the nexus and proportionality tests were intended to curtail the "municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]" Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995).

In this case, the City established neither nexus nor proportionality.

I. THE CITY CANNOT ESTABLISH A NEXUS

The Supreme Court requires the government show that the demanded exaction has an "essential nexus" with—in other words, is necessitated by—the owner's proposed uses. Only then does the exaction have a nexus to the legitimate government objective asserted as the basis for the exaction. *See Sheetz*, 601 U.S. at 275 ("The nexus requirement ensures that the government is acting to further its stated purpose."). Here, that relationship is missing. KOGAP is not responsible for the fact that Myers Lane is a dead-end road. And KOGAP's development, which maintains pre-existing block lengths, does not create an impact that the Myers Lane exaction would mitigate. Instead, the Myers Lane exaction was sought out by City planners well in advance of any identification of impacts related to KOGAP's 2022 development applications.

The City's nexus determination stated that "the purposes for these dedications and improvements are found throughout the Medford Code, the Medford Transportation System Plan, and Statewide Planning Rule, and [are] supported by sound public policy." ER-132. Those purposes, as codified in the City's block length code provision, are to address "the public need for promoting connectivity and a balanced transportation system by establishing block standards to ensure that streets are constructed or extended in projections that maintain their function, provide accessibility, and continue an orderly pattern of streets and blocks." ER-14 (summarizing the government interest as the "functional, accessible, and orderly patterns of streets and blocks.").

While that generalized determination of public need may be sufficient to meet the City code's lax nexus standard,[13] it cannot satisfy *Nollan*'s "essential nexus" requirement. Indeed, it is black letter law that, standing alone, a determination of public need "does not establish that the [landowner] alone can be compelled to contribute to its realization." *Nollan*, 483 U.S. at 841. Instead, the City must take the additional step of showing that KOGAP's proposed land use will create or exacerbate that public need. *Nollan*, 483 U.S. at 837 ("[U]nless the permit condition

[13] The City's determination that the exaction satisfied the code's deferential regulatory nexus and proportionality standards cannot determine the constitutional questions presented. *Marbury v. Madison*, 5 U.S. 137, 179–80 (1803) (legislature cannot enact laws that limit the judiciary's duty to interpret constitutional provisions).

serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"); *Com. Builders of N. California v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) ("an exaction on developers can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate").

Holding Medford to that requirement is critically important here where, several years before the revision application, the City determined that past residential development had resulted in numerous disconnected and dead-end roads. *See* Add.-3. The City's Transportation System Plan determined that existing roadway conditions caused the very same public problems—*i.e.*, longer trip distances, increased reliance on arterials for local trips, and limited options for pedestrians and bicyclists—that the City asserted as justifications for taking the Myers Lane exaction from KOGAP four years later in 2022. *Id*. Indeed, the City's post-exaction amendments to its Transportation System Plan confirmed that it sought to solve problems associated with "a lack of connectivity in an **existing network** that needs to be addressed." Add.-3 (emphasis added). That is not all. Elsewhere, City staff claimed that the traffic impacts of future residential development west of KOGAP's property would cause the problems supposedly arising from the dead-end on Meyers Lane. ER-33.

In this circumstance, the City's failure to identify the specific impact that KOGAP's revision will have on the Myers Lane dead-end is constitutionally unacceptable. The record confirms that the PUD revision did not *create* the problem—the dead-end was caused by past residential development. Add.-3. Nor will the revision *exacerbate* the problem by increasing the number of vehicle trips in the area. ER-30, 34. ("The revision before Council does not increase total number of trips for the PUD".... "[T]his revision does not necessary [sic] create new trips...."). Instead, the only new traffic impacts considered by the City are those attributable to future residential development. ER-33. And the City, moreover, offered no explanation for how a revision that retains the existing and previously approved block length along Anton Drive will worsen the pre-existing need to connect the dead-end on Myers Lane. Thus, the City cannot meet its burden under *Nollan*.

Case law applying the nexus test in similar circumstances confirms this conclusion. In *Hill v. City of Portland*, for example, a city conditioned approval of a subdivision on a requirement that the owner dedicate a right-of-way along the site's frontage to accommodate future street improvements necessary to bring the street up to current design standards. 293 Or. App. 283, 284–85 (2018). A hearing examiner upheld the exaction against a *Nollan/Dolan* challenge and the owner appealed. *Id*. at 286–87. At issue was whether the city could demonstrate nexus based on a showing

that the exaction was necessary to bring the adjacent street into compliance with current design standards, without identifying any specific impacts that the proposed development would have on that interest. *Id*. at 286. The owner argued that a showing of non-compliance with city requirements, alone, cannot satisfy nexus. *Id*. at 288. Instead, the owner argued that nexus requires the government to identify the "specific impacts" justifying the exaction. *Id.*

The Court of Appeals agreed, concluding that the nexus test requires more than a mere showing of non-compliance with code requirements; the government must also show how the project's impacts would "substantially impede the interest identified by the government." *Id*. (government must identify and "take into account a proposal's impacts" on the public problem that the provision seeks to address) (internal quotation omitted). The court thereafter concluded that the hearing examiner had "legally erred in his application of the *Nollan/Dolan* framework" because the city "did not examine how the impacts of petitioner's proposal substantially impede the governmental interest or interests embodied in the city's right-of-way design standards." *Id*. Instead, the city wrongly believed it could satisfy *Nollan* "simply by demonstrating that its approval criteria allow it to deny a permit on the ground that an existing right-of-way does not meet design standards, without any consideration of whether and how petitioner's proposal will impede the

particular governmental interest or interests advanced by those design standards." *Id*. Medford commits the same error here.

The point is further affirmed by the Wisconsin Court of Appeals' decision in *Fassett v. City of Brookfield*, 975 N.W.2d 300, 307 (Wisc. App. 2022). There, like here, a subdivision applicant owned property located between two pre-existing dead-end roads that the city wanted to connect. *Id.* at 301–02. The city approved the subdivision on the condition that the owner dedicate property and funds toward the installation of a new road connecting the dead-ends. *Id*.

The Wisconsin Court of Appeals concluded that the exaction failed the nexus test. *Id.* at 305–09. The court began by characterizing the permit condition as seeking "to mitigate, or improve, the impacts of the 'status quo'—the existing dead-end streets." *Id*. at 307. As here, the dead-end streets were not created by the proposed subdivision, but instead by earlier development abutting the property. *Id*. The city demanded the exaction based on the code's goal of minimizing dead-end streets, which serves a number of public benefits including public safety, improved function, and shortened travel times for transportation and pedestrians. *Id*. But as here, the city "did not tie these considerations to any impact caused by the proposed land split. There is no evidence that the proposed development would increase congestion, decrease safety, or hinder the adequate provision of transportation." *Id*. Nor was there "even an identified public burden generated by [Fassett's applications], and

thus it follows that there can be no nexus between a legitimate government interest in mitigation and the through-street condition." *Id*. at 308.

Judge Breyer of the Federal District Court for the District of Northern California reached a similar conclusion in *Levin v. City and Cnty. of San Francisco*, 71 F.Supp.3d 1072, 1086 (N.D. Cal. 2014); *appeal dismissed and remanded on other grounds* 680 F. App'x 610 (9th Cir. 2017). At issue there was an ordinance that required owners to pay tenants a relocation fee as a condition of approval to remove a property from the rental market and to reoccupy their homes. *Id*. at 1074. Like *Fassett*, the *Levin* court concluded that the relocation fee failed the nexus test because it sought to force individual owners to solve a public problem that was not of their making. *Id.* at 1084. The court explained that "the nature of the exaction here does not purport to have a nexus with anything the property owner actually caused, but rather with market forces unrelated to the impact of the property owner's use of the property." *Id*. at 1087. The court further explained that exaction had no nexus because "it seeks to force the property owner to pay for a broad public problem not of the owner's making." *Id*. at 1086. The same is true here. KOGAP cannot constitutionally be compelled to dedicate its property to solve a problem that is not of its making.

Like the City, the district court's opinion made no determination of any specific impact attributable to KOGAP's proposed revision, offering only that

"government interests of local street connectivity [is] impeded by the development's noncompliance" with the block length code provision. ER-18. But to reiterate, KOGAP's proposed revision will generate no new vehicle trips and leaves the block lengths unchanged from their existing and previously approved state. ER-159, 213. Thus, without showing new traffic impacts or altered block layouts to be mitigated, the only conceivable way that KOGAP's revision could be construed to "impede" the City's interest in connecting Myers Lane is the fact that KOGAP owns, and proposes to use, the very property that the City has targeted for a new street.

But a determination that a dedication of private property will serve a public need does not speak to whether the dedication is needed to address a negative public impact of the development. *See also* 2 Rathkopf's The Law of Zoning and Planning § 28:27 (4th ed.) (owners may not be singled out as simply convenient targets of opportunity for dealing with community problems). Instead, the determination that a person's property will serve a public need only indicates that the government should pay for the property as required by the Takings Clause. *Nollan*, 483 U.S. at 841–42. Because the Myers Lane exaction requires KOGAP to solve a problem that it did not create or exacerbate, it lacks an essential nexus and is constitutionally invalid. *See Nollan*, 483 U.S. at 838–39; *see also id.* at 837 (in the absence of a nexus between a permit condition and a project's impacts, the City's purpose can only be

understood as "the obtaining of property to serve some valid government purpose but without payment of compensation.").

II. THE CITY CANNOT ESTABLISH ROUGH PROPORTIONALITY

As a matter of logic, an exaction that fails nexus cannot possibly satisfy proportionality. Without a nexus, there is no pertinent impact to which the exaction can be proportional. But even if the City *could* establish a nexus, its demand for a Myers Lane extension would still fail the proportionality test because it cannot show that the exaction does not exceed the doctrine's project-impact mitigation standard. *Dolan*, 512 U.S. at 384; *Koontz*, 570 U.S. at 604–05; *see also Sheetz*, 601 U.S. at 276 ("A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose.").

Dolan places a heightened scrutiny burden on the government to demonstrate proportionality. *Dolan*, 512 U.S. at 391. To meet this burden, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. While "[n]o precise mathematical calculation is required," the government "must make some effort to quantify its findings in support of the dedication." *Id*. at 395–96. In doing so, the government cannot rely on "generalized statements" that are "too lax to adequately protect" constitutional rights. *Id*. at 389.

Medford failed to carry the burden of demonstrating that the Myers Lane exaction is commensurate with any identified impact attributable to the proposed PUD revision. Instead, the City justified its exaction based on three inapposite considerations: first, that the benefits accruing to KOGAP offset the burden imposed on the developer; second, that the exactions were needed to account for impacts of potential future developments by other property owners; and third, that Medford had imposed exactions of similar proportions on other property owners in the past. Each of these considerations is wholly irrelevant to the question asked by the proportionality test: whether the extent of property exacted from KOGAP is roughly the amount needed to address the impacts of the proposed development. *See Dolan*, 512 U.S. at 391.

A. Benefits to a development are irrelevant in the rough proportionality analysis

Medford's proportionality determination stated, in part, that its demand for the Myers Lane exaction satisfied proportionality provision because, in its estimation, the KOGAP would benefit from the demanded roadway extension. ER-132; *see also* ER-22 (district court opinion, concluding that the City established proportionality because, in part, it inquired into "the potential benefits to the development itself"). That inquiry, however, does not address the substance of *Dolan*'s rough proportionality test, which requires the government to show that the extent of property demanded in a permit condition is roughly the amount needed to

mitigate the impacts of a development. *Dolan*, 512 U.S. at 391; *Sheetz*, 601 U.S. at 276. The purpose of that inquiry is to ensure that a permit applicant is not being forced to bear the cost of addressing public problems that are not attributable to his or her proposed development. *Dolan*, 512 U.S. at 384 (citing *Armstrong*, 364 U.S. at 49). Thus, *Dolan* is wholly unconcerned with whether a demand for property could potentially benefit the burdened property owner.

There is no doctrinal basis for considering an exaction more proportionate just because the owner may derive some common or incidental benefit from the government decision to put the demanded property to public use. *Nollan*, 483 U.S. at 841 (a determination that the exaction will provide such benefits "does not establish that the [landowner] alone can be compelled to contribute to its realization."). After all, it is fundamental that a government appropriation of private property to advance a development plan, like Medford's Transportation System Plan, is presumed to provide common public benefits. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 478 (2005). Because all property owners are members of the public, some common and incidental benefit to the owner will almost always result. *Art Piculell Grp. v. Clackamas Cnty.*, 142 Or. App. 327, 336 (1996); *see also Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 642–43 (Tex. 2004) (explaining that the benefits flowing to a property owner from an exaction reflect the fact that the property is being put to an appropriate public use, like a park). Thus,

courts have routinely held exactions subject to *Dolan*'s heightened scrutiny test even where the owner may derive some benefit from it. *See*, *e.g.*, *Levin*, 71 F.Supp.3d at 1086 (that a condition provides private benefits is not a defense to *Nollan/Dolan*); *Art Piculell*, 142 Or. App. at 336–37 (an exaction must satisfy nexus and proportionality even where it benefits the burdened property); *Clark v. City of Albany*, 137 Or. App. 293, 298–300 (1995) (same); *Murphy Auto Grp., Inc. v. Fla. Dep't of Transp.*, 310 So. 3d 1066, 1070 (Fla. Dist. Ct. App. 2020) (same).

Medford has merely recited a list of common and generalized benefits associated with any new road connection, including "improving vehicular, bicycle, and pedestrian access," "creating another full movement intersection," "providing an alternative route into the development," and "increased property values, intensification of use, as well as connections to municipal services and the transportation network." ER-132. In this way, the benefits to KOGAP are not meaningfully different from those that Ms. Dolan would have received from increased pedestrian/bicycle traffic on the trail adjacent to her store. *See Dolan*, 512 U.S. at 378; *see also Nollan*, 483 U.S. at 856 (noting that Mr. Nollan could benefit from similar beachfront exactions on neighboring properties) (Brennan, J., dissenting). Those common benefits did not factor in the U.S. Supreme Court's decision in *Dolan*, and they should not factor here. Thus, to the extent the City

considered those benefits to offset the burdens imposed on KOGAP, its proportionality analysis was unsupported law and must be rejected.

Medford's related determination that the exaction was proportionate because, in its estimation, it imposed a negligible burden on KOGAP fares even worse under *Dolan*. That is because, once again, *Dolan* requires the government to determine whether the extent of property demanded from the owner is commensurate with the impacts of the proposed development. 512 U.S. at 391. Without that determination, it matters not whether the exaction demands $1 in property or $1,000,000. *See*, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 422, 435 (1982) (concluding that the compelled installation of a 4-inch box on the roof of an apartment building resulted in a compensable taking).

Even so, the City's determination that the Myers Lane exaction would not be "costly" is legally indefensible. City staff did not substantively dispute KOGAP's estimate that the cost of land and improvements would exceed $700,000. ER-126. Nor did staff ever state what type of road would be required on the right-of-way and bridge. Instead, City staff discounted the cost of constructing the road segment by the amount of money that KOGAP had earmarked for building a parking lot on the property. *Id*. The City explained that, as KOGAP's "currently proposed site plan shows a parking lot over the requested street path, the City is not requiring land dedication or asking for costly improvements." *Id*. It continued, "[a]ny increase of

cost to comply with public or private street requirements is incremental over the cost of the pavement of the parking lot already proposed." *Id*. The City, however, provided no evidence or calculations establishing the cost to KOGAP, offering only the vague conclusion that it would not be "costly." That, alone, compels a conclusion that the City failed to carry its burden under *Dolan*. 512 U.S. at 395–96 (the government "must make some effort to quantify its findings in support of the dedication"). But there is more.

The City's determination cannot stand as a matter of law. Staff's conclusion that the exaction does not require a dedication of land is obvious error. *See* ER-135 ("As the applicants['] currently proposed site plan shows a parking lot over the requested street path, the City is not requiring land dedication…"). By definition, a right-of-way takes a physical interest in the land. *Est. of Finnigan v. United States*, 2 F.4th 793, 796 (9th Cir. 2021). The City also erred when it reduced the cost of satisfying the exaction by the monies that KOGAP had earmarked for the private development of that property.[14] *See*, *e.g.*, *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (preventing circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in

[14] In *Norwood*, the village condemned petitioner's property for a road, paid compensation, then tried to reclaim the money by demanding that she pay it back as an alleged assessment on her property. She sued, claiming the assessment effected an uncompensated taking. The Court held that imposing upon the property owner the obligation of paying for the condemnation effected a taking in itself.

advance of condemning it). Thus, to the extent the City based its proportionality analysis by this inappropriate determination of the burden on KOGAP, its decision is unsupported law and must be rejected.

B. The rough proportionality test does not allow the government to compel an owner to mitigate for the potential impacts of future offsite development

Medford's proportionality analysis also justified the Myers Lane exaction, in part, because it would address the anticipated impacts of future offsite development to the west and south of the PUD. *See* ER-33, 84. Although it may be appropriate to consider the combined impacts of future offsite development when determining whether a nexus exists, *Hill*, 293 Or. App. at 290, such consideration has no place in the rough proportionality analysis. Indeed, the very purpose of the rough proportionality requirement is to make sure that the extent of property exacted is roughly only that amount needed to address the impacts of the particular development under consideration. *See Dolan*, 512 U.S. at 391. This means that, insofar as impacts of other offsite developments may be considered in the proportionality analysis, it must only be to apportion the mitigation responsibilities among the developments that contribute to the identified public problem. *Id*. The City cannot constitutionally place the entire burden of mitigating cumulative development impacts on a single developer. *Id*.

The California case *Alliance for Responsible Planning v. Taylor*, 63 Cal. App. 5th 1072, 1075, 278 Cal. Rptr. 3d 376, 378 (2021), is instructive on this point of law. There, voters in El Dorado County passed a ballot measure requiring new developments to provide traffic infrastructure necessitated by the cumulative impact of all developments. *Id*. at 1075–77. For example, if a nearby highway interchange was already at its maximum capacity of 5,000 peak-hour vehicle trips, and a new development would cause the interchange to exceed that threshold by generating two new trips over the existing 5,000, then the developer would have to construct a new interchange to preserve existing service levels. *See id*. The California Court of Appeal noted that under *Dolan*, the County "could not ... condition approval on building improvements that far exceed the project's impact." *Id*. at 1077. It held that if the ballot measure "requires the completion of '[a]ll necessary road capacity improvements' to prevent peak-hour gridlock, it plainly casts a wider net than the harm resulting from an individual project. Thus, rough proportionality is unsatisfied[.]" *Id*. at 1085. Even if the ballot measure "demands only mitigation addressing traffic from the discretionary project combined with cumulative traffic impacts from new development, a developer must still complete improvements addressing impacts beyond its own. Thus, this too exceeds rough proportionality." *Id*. at 1085.

To similar effect is *Fassett*. There, as discussed above, the government required a property owner to connect two dead end roads on adjacent properties as a condition of subdividing land. 975 N.W.2d. at 302. This connection was not necessary to serve the proposed subdivision, as the lot could readily connect to an adjacent public road via a shared driveway. *See id*. Nor would the subdivision generate new traffic impacts warranting a new through-road. *Id*. Thus, it followed "that there can be no rough proportionality." *Id.* at 308.

Here, like the exactions in *Alliance* and *Fassett*, Medford demanded that KOGAP convey all the real property and pay a significant sum of money needed to alleviate impacts attributable to other developments. This is confirmed by KOGAP's traffic study, which showed that even with a full build-out of the offsite properties, only 12 vehicles were likely to use the Myers Lane extension during peak hour traffic, and only 2 of those would use Myers Lane for the purpose of accessing Stewart Meadows Village. ER-209. In other words, even if Stewart Meadows Village created a need for the Myers Lane extension (which it does not), the traffic study showed that it would only contribute one-sixth of the anticipated traffic on that road. Medford's attempt to rebut the traffic study only reinforces the point. The public works department tellingly criticized the study's traffic count for not considering "future development along … Holly Street"—*i.e.*, the potential impacts

of future development that are not attributable to any of the changes proposed by the PUD revision applications. *See* ER-127–128.

To the extent Medford considered future offsite development, it was required to quantify how the impacts of those developments contributed to the need for the Myers Lane extension, compare that to KOGAP's impacts, and apportion the cost and amount of property needed among those developments. *See, e.g.*, *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 2012 UT 26, ¶ 23, 282 P.3d 41, 46 (attributing 5% of a necessary road widening project to the traffic impacts of B.A.M.'s proposed development). KOGAP cannot constitutionally be forced to give up property on the basis that it is needed to address impacts from other developments.

C. Proportionality cannot be determined by reference to unchallenged exactions imposed on other developments

Medford also justified the Myers Lane exaction based on its observation that the size of the exaction was similar to demands made on other developments. ER-133–134; *see also* ER-21 (district court, concluding that "in the spirit of fairness, and considering the difficulty in demonstrating rough proportionality [], it was reasonable for the City to make comparisons to its historical practices.").[15] That

[15] There is no caselaw endorsing this short cut around *Dolan*'s individualized determination requirement. Indeed, decades of unconstitutional conditions caselaw show that, when an exaction is imposed for legitimate impact mitigation purposes, local governments routinely and "with ease" demonstrate nexus and proportionality. *F.P. Dev.*, 16 F.4th at 207–08.

consideration cannot establish proportionality. *Dolan* requires a showing that the extent of property taken in an exaction is roughly proportional to the impacts of the proposed development. 512 U.S. at 391 (the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."). The amount of property taken from other developments is not useful for determining rough proportionality because the impacts of other developments are categorially not the impacts of the proposed development. *See id*. For that reason alone, the City's consideration of other exactions should be rejected. But there is more.

The City's comparison analysis should also be rejected because the quality of the information it relied on to determine proportionality is utterly insufficient to protect an owner from a taking disguised as a permit condition. *Dolan*, 512 U.S. at 391 (the proportionality test "best encapsulates what we hold to be the requirement of the Fifth Amendment."). Nothing in the City's analysis speaks to "the actual burden imposed on property rights, or how that burden is allocated," and therefore it "cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). Instead, "in determining rough proportionality," the City simply compared the size of the Myers Lane exaction to exactions it had imposed on other properties for other reasons. ER-133. That analysis is based on

generalizations that are far "too lax to adequately protect" constitutional rights, and which cannot justify the uncompensated taking of KOGAP's property. *Dolan*, 512 U.S. at 389.

Even if the City were allowed to consider other exactions when evaluating proportionality, its analysis below was so fundamentally flawed that it cannot possibly satisfy *Dolan*'s "individualized determination" requirement. Indeed, when collecting "comparable" permit decisions, City staff chose to compare apples to oranges by selecting numerous exactions designed to mitigate traffic impacts (which are easily quantified), instead of considering exactions purporting to address the public interest at issue here—*i.e.*, the public's interest in developing a functional and orderly street network. ER-132–133. Thus, the City's analysis proceeded from the false premise that exactions will be the same in size, regardless of the particular facts or public problems they are intended to address. That assumption is refuted by *Dolan*, which recognized that the amount of mitigation that may be constitutionally justified by a project's impacts will vary on a case-by-case basis. *Dolan*, 512 U.S. at 389–91.

Simply comparing exactions based on the percentage of property taken cannot address the purpose of the proportionality test. *See Tap House Real Est., LLC v. City of Rochester*, No. 22-cv-492 (ECT/DTS), 2024 WL 3470824, at *8 (D. Minn. July 19, 2024). In *Tap House Real Estate*, for example, a federal district court denied a

government motion for summary judgment because, standing alone, the city's decision to allocate a percentage of the cost to construct traffic improvements onto a proposed development could not satisfy proportionality. 2024 WL 3470824 at *9. "Without some effort to apportion (or at least explain) Tap House's relative impact on the need for the stoplight, this percentage figure is not helpful," and cannot determine whether the development "reasonably contributes to the necessity of transportation improvement projects paid for by [the traffic impact fee]." *Id.*

Like *Tap House*, Medford's comparison of exaction percentages cannot establish proportionality because percentages alone cannot determine whether the Myers Lane exaction was roughly proportionate to the impacts of the PUD revision. Indeed, the appropriate level of mitigation will vary based on the asserted government interest, the proposed land use, the impacts to be mitigated, the level of infrastructure already in place, the pre-existing levels of traffic connected with existing land-uses in the area of development, and other unique factors. *See*, *e.g.*, Oregon Dept. of Trans. *Best Practices for Traffic Impact Studies* June 2006 p. 11 (describing the many variables that go into a traffic impact analysis).[16] Thus, without evaluating the details of each exaction, there is no way to determine whether the

[16] Available at https://tinyurl.com/3e3musmd.

percentage of property exacted for traffic infrastructure from other developments is the same amount that is needed and proportionate for KOGAP's development.[17]

Medford has failed to meet its burden of demonstrating rough proportionality as a matter of law. For these reasons, the Court should reverse the district court's order and hold the exaction unconstitutional.

III. SHOULD THIS COURT APPROVE OF THE CITY'S METHODOLOGY, IT SHOULD REMAND THE MATTER TO ALLOW A TRIAL ON GENUINE ISSUES OF MATERIAL FACT

If this Court agrees that the City's methodology for determining nexus and proportionality did not comply with *Nollan* and *Dolan*, then there is no need to address the parties' competing factual claims because the disputes would not be material. But even if this Court were to approve of the City's analysis, the district court's summary judgment ruling would still warrant reversal because it improperly determined several genuine issues of fact that are properly preserved for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."); *see also Heritage*

[17] Besides, just because those other exactions went unchallenged does not mean that they were constitutional. As far as the record is concerned, Medford may well be establishing how similar in proportion the Myers Lane exaction is to other uncontested, yet unconstitutional exactions it has imposed in the past. Indeed, the U.S. Supreme Court noted that exactions often go unchallenged because the value of the permit approval exceeds the demand. *Koontz*, 570 U.S. at 612.

at Pompano Hous. Partners v. City of Pompano Beach, No. 20-61530-CIV-SMITH/VALLE, 2021 WL 8875658, at *8 (S.D. Fla. Dec. 15, 2021) ("[I]t is an issue for the jury to decide whether ... there is a rough proportionality between the public costs of the Project and the Improvements."); *Skoro v. City of Portland*, 544 F. Supp. 2d 1128, 1131 n.1 (D. Or. 2008) (concluding that rough proportionality is a mixed question of law and fact which may be submitted to a jury).

The district court's conclusion that the Myers Lane exaction satisfied *Nollan* and *Dolan* relied on several determinations of contested fact in favor of the City. Speaking to nexus, the court determined that KOGAP's proposed development raised the "potential for congestion from more vehicles being diverted from Garfield Street into the development." ER-22. To reach this determination, the court stated that it had adopted the analysis and conclusions contained in the City's staff report and the opinions of the planning commission over the competing conclusions of KOGAP's expert traffic analysis. ER-17. Most notably, the court found that "the proposed changes to the development will result in more cars being diverted off the main road and into the development's drive-through restaurants" (ER-18) and that "the trips generated by the development as a whole were expected to burden this area to a significant extent" (ER-16), despite a traffic report concluding that the revision will result in no new trips and that, of the previously approved trips, only two evening trips to the development would utilize the demanded roadway. ER-107, 209.

Moreover, the court made these traffic-related nexus findings despite the fact that the City had disclaimed that it relied on traffic impacts when developing the exaction, and as a result had offered no traffic study of its own or other evidence showing that the revision would increase or alter the traffic flow south of Garfield Street. *See* ER-30, 34.

The court also made several findings relating to the proportionality inquiry. Most notably, the court accepted as true the City's determination of "the financial cost to the developer, and the potential benefits to the development," and further determined that the City's had considered "similar developments and required dedications" when engaging in its comparative analysis. ER-22. As discussed above, KOGAP contested each of those assertions by providing expert and other evidence in the record.

Critically absent from the district court's ruling (and the City's record) is any determination regarding the type of road (*i.e.*, the cost) that KOGAP will be required to dedicate and construct—let alone any determination that the City's demand that KOGAP fund 50% of the bridge over Hansen Creek at some point in the future no matter what it ultimately costs is proportionate to the proposed PUD revisions. Such a decision effectively gives the City a blank check to compel KOGAP to pay the costs of its goal of building a new high-grade through-street to the south of Garfield

Street, without any limitation. ER-109 (designating the future Myers Lane as a commercial-grade street).

The district court erred in determining these several genuine and contested issues of material fact in favor of the City when ruling on its motion for summary judgment. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021); *see also* Fed. R. Civ. P. 56. In this circumstance, the Court should reverse the court's decision to grant summary judgment to the City and remand the matter for the factfinder to decide whether the Myers Lane exaction was truly "proportional to the development's anticipated impacts." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999).

CONCLUSION

For the foregoing reasons, this Court should rule that the Myers Lane exaction violated the doctrine of unconstitutional conditions and reverse the district court's order granting summary judgment to the City and denying KOGAP's motion for summary judgment, remand this matter for a determination of damages, and for an award of attorneys' fees and costs as set out by ORS § 197.796(5). Should this Court conclude that there are genuine issues of material fact, then it should reverse the district court's order granting summary judgment to the City and remand the matter for trial.

DATED: December 30, 2024.

Respectfully submitted,

s/ Brian T. Hodges

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STATEMENT OF RELATED CASES

Counsel for Appellant states there are no related cases within the meaning of Circuit Rule 28-2.6.

Form 8. Certificate of Compliance for Briefs
9th Cir. Case Number 24-5268

I am the attorney or self-represented party.

This brief contains 12,996 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/ *Brian T. Hodges* **Date** December 30, 2024.
BRIAN T. HODGES

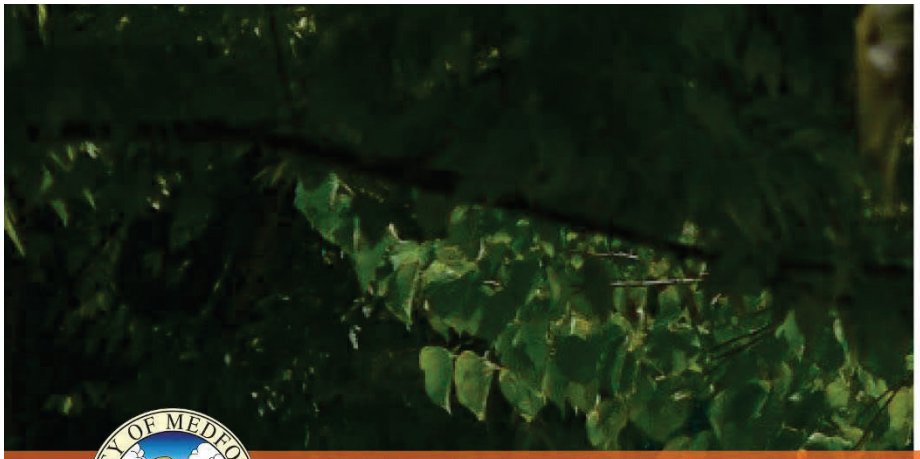
CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Brian T. Hodges
BRIAN T. HODGES
Attorney for Plaintiff – Appellant

Addendum



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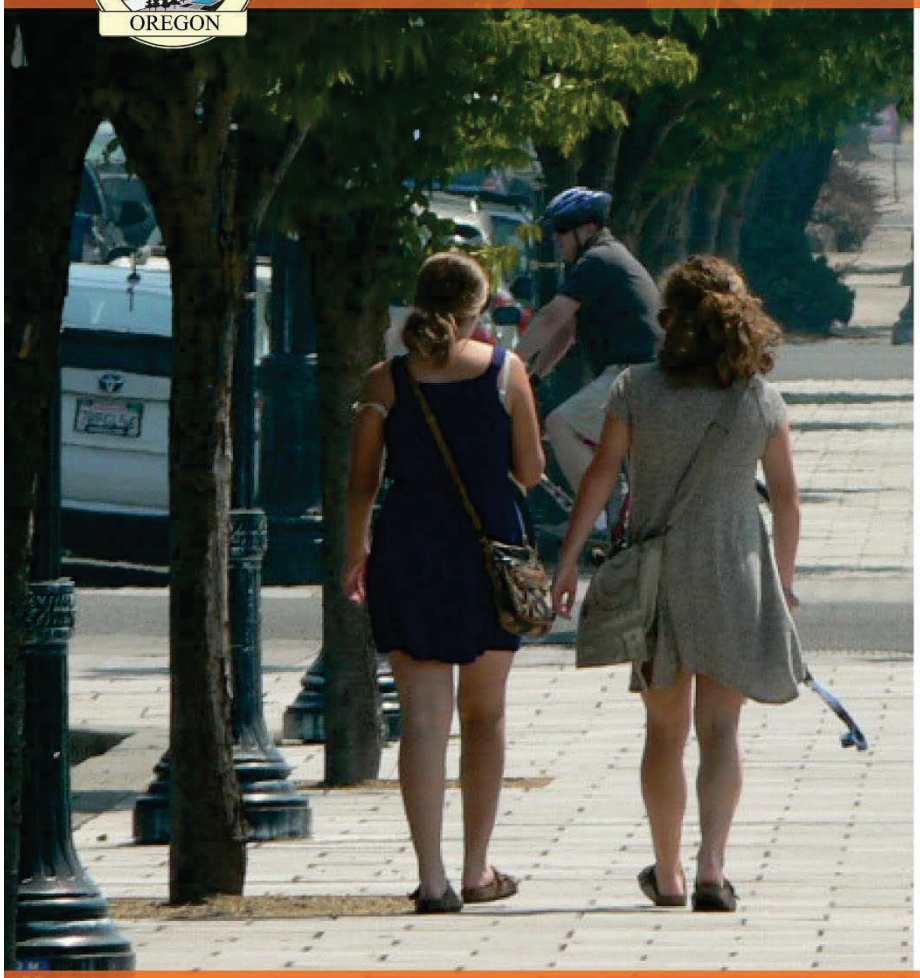

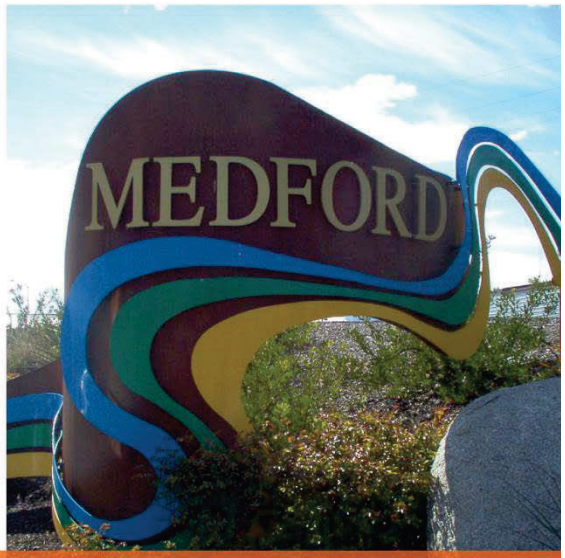

TRANSPORTATION SYSTEM PLAN

2018-2038

Adopted by Medford City Council December 6, 2018
By Ordinance NO. 2018-126

2/5/2019: Scrivener's error corrected on page 78 – Project 481 changed "two lanes" to "one lane" in the description

Amended by Medford City Council – October 7, 2021; Ordinance No. 2021-120

Amended by Medford City Council – October 21, 2021; Ordinance No. 2021-128

Amended by Medford City Council – December 15, 2022; Ordinance No. 2022-148

enhance safety and promote mobility. ODOT identifies half mile as the desirable spacing of signalized intersections on regional and statewide highways but recognizes that shorter signal spacing may be appropriate due to a number of factors including existing road layout and land use patterns[6]. Signal spacing below ODOT or City standards should be studied in detail to consider traffic signal coordination and the impacts of vehicle flow, queuing, and safety within the area. At that time adjacent signals and the spacing between them can be evaluated.

Street Connectivity

Many of the residential neighborhoods in Medford are served by a network of cul-de-sacs and dead end streets. These streets can be desirable to residents because they can limit traffic speeds and volumes on local streets, but cul-de-sacs and dead end streets result in longer trip distances, increased reliance on arterials for local trips, and limited options for people to walk and bike to the places they want to go. By providing connectivity between neighborhoods, out-of-direction travel and vehicle miles traveled (VMT) will be reduced, congestion will be improved on roads such as N Phoenix Rd, E Barnett Rd, Crater Lake Ave, Table Rock Rd. Additionally, improved connectivity will reduce public safety-response time.

The City's standards for street connectivity and maximum block length are identified in Medford Municipal Code 10.426 and they help ensure that future development results in well-connected streets. Incremental improvements to the street system are planned to provide route choices for motorists, bicyclists and pedestrians while accounting for potential neighborhood impacts. The quality of the transportation system is enhanced by making connectivity improvements to the pedestrian and bicycle system separate from street connectivity.

Figure 23 and Table 23 identify locations and conceptual alignments of potential future local street connections. These do not represent all future local streets but identify locations where there is a lack of connectivity in an existing network that needs to be addressed by the City or through future development. In limited cases, a short length of new road would be necessary for improved connectivity. In most cases, potential local street and neighborhood route connections represent streets to be constructed by future development and extension of existing stub end streets. Pedestrian connections from any cul-de-sac should be considered as future development and redevelopment occurs. The goal is to continue to improve connectivity for all modes of transportation. In each case, the specific alignments may be modified dependent upon future development review.

[6] MUTCD signal warrants must be met based on ODOT methodology and OAR 734-020-460 (1) A traffic signal shall not be installed unless one or more of the warrants identified in the MUTCD are met or will be met consistent with the requirements of OAR 734-020-0490. The satisfaction of a warrant or warrants, however, is not in itself justification for a traffic signal. Installation of a signal must be approved by the State Traffic Engineer on a regional or state highway.

Table 23 Street Connections

Project Number	Name	Type
L1	Gilman Road Extension to Table Rock	Local Street
L2	Viewpoint Dr Extension to Tiffany Street Extension	Local Street
L3	Bryson Way Extension to Tiffany Street Extension	Local Street
L4	Tiffany Street Extension to Augustine Drive	Local Street
L5	Wheatridge Extension to Tiffany Street Extension	Local Street
L6	Wilkshire Rd to Roberts Dr Connection	Local Street
L7	Murphy Rd extension from Country Club Drive to Hillcrest Rd.	Local Street
L8	Valley View Drive extensions to McAndrews Road and to Spring Street	Local Street
L9	Bell Court connection to Temple Drive at Montelimar Drive	Local Street
L10	Cedar Links Dr extension to Perri Pl through residential	Local Street
L13	Grandview Avenue extension to Steelhead Run	Local Street
L14	Center Drive extension to Charlotte Ann Road	Local Street
L15	Highgate Street extension to Charlotte Ann Road	Local Street
L16	Archer Drive extension to Kings Highway	Local Street
L17	Ford Drive, Springbrook Road to eastern UGB	Local Street
L18	Meadows Lane – Clover Lane to Lozier Lane*	Local Street
L19	Meadows Lane – Clover Lane to 130 feet west*	Local Street
L20	Meadows Lane – Moody Lane to Cherry Street*	Local Street
L21	Meadows Lane – Cherry Street to Jeanette Avenue*	Local Street
L22	Vick Lane – W 8th Street to Meadows Lane*	Local Street
L23	Vick Lane – W Main Street to W 8th Street*	Local Street
L24	Vick Lane – Prune Street to Dakota Avenue	Local Street
L25	Vick Lane – Dakota Avenue to 120 feet north of Windward Drive	Local Street
L26	Vick Lane – 120 feet south of Windward Drive to 250 feet north of Aster Street	Local Street
L27	Vick Lane – Aster Street to Stewart Avenue	Local Street
L28	W 8th Street – Vick Lane to Lozier Lane	Local Street
L29	Charles Lane – Lozier Lane to Clover Lane*	Local Street
L30	Charles Lane – Clover Lane to Darlington Street*	Local Street
L31	Newbridge Way – Harbinger Lane to Orchard Glen Estates*	Local Street
L32	Darlington Street – Newbridge Way to W Main Street*	Local Street
L33	Newbridge Way – Reager Street to Ross Lane North	Local Street
L34	Locust Street – Western Avenue to Reager Street	Local Street

Project Number	Name	Type
L35	W 2nd Street – McAndrews Road to Ross Street	Local Street
L36	New north-south street – Kauai Street to W Main Street	Local Street
L37	Myers Lane (south of Garfield Street) – East end to Anton Drive	Local Street
L38	Marsh Lane – Nobility Drive to Sparrow Way*	Local Street
L39	Marsh Lane – Sparrow Way to Glairgeau Circle*	Local Street
L40	Lillian Street to Lilybrook Lane connection	Local Street
L41	Mace Road – Merriman Road to Hayes Avenue*	Local Street
L42	Midway Road – Tennessee Drive to Merriman Road*	Local Street
L43	Morningside Street- Table Rock Road to Foster Drive	Local Street
L44	Elliot Avenue – Elk Street to 285 feet north	Local Street

*Indicates streets that may require City participation to complete

Figure 23 Street Connectivity