No. 11-299

In The
Supreme Court of the United States

WEST LINN CORPORATE PARK L.L.C.,

Petitioner,

v.

CITY OF WEST LINN, BORIS PIATSKI
and DOE DEFENDANTS 1 THROUGH 10,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The questions presented to this Court by the Petitioner are irrelevant because they are not based upon the actual facts in the case at bar; and they mislead one into thinking that the Petitioner was not compensated for the off-site improvements it constructed pursuant to a Public Improvements Guarantee agreement entered into with the City of West Linn. In addition, the district court's decision that the Petitioner's federal takings claim is not ripe has not been overturned; thus, the Petitioner's questions are immaterial, and any answer to the questions do not reverse the judgment entered against Petitioner on the federal takings claim because the City still prevails. Thus, unless this Court wants to issue an advisory opinion that does not affect the judgment entered against the Petitioner, this Petition for a Writ must be denied.

If the Court is going to grant a Writ in this case, and give an advisory opinion, the correct question in the case at bar is as follows:

Can a second developer that purchases property from an original developer claim it has been subjected to an exaction for constructing off-site improvements, when the property was purchased by the second developer after the conditions were imposed, and where there never was any objection or appeal of the conditions imposed by either the original developer or the second developer, and when the second developer was compensated for the off-site improvements at its request with SDC credits issued pursuant to ORS 223.297 to ORS 223.314 and the codes of the City of West Linn.

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OPINION BELOW

The opinion of the (trial court) United States District Court for the District of Oregon is unreported. (Petitioner's App. 1a-14a). The first opinion of the Ninth Circuit is reported at *West Linn Corporate Park, L.L.C. v. City of West Linn*, 534 F.3d 1091 (9th Cir. 2008). The Oregon Supreme Court's opinion answering the Ninth Circuit's three certified questions is reported at *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P.3d 29 (2010). The Ninth Circuit's subsequent opinion is unreported at *West Linn Corporate Park, L.L.C. v. City of West Linn*, 2011 WL 1461372 (9th Cir. Apr. 18, 2011).

JURISDICTION

The Ninth Circuit's most recent opinion was entered on April 18, 2011. The Ninth Circuit subsequently denied a timely petition for panel rehearing and rehearing *en banc* on June 7, 2011. Petitioner invoked this Court's jurisdiction under 28 U.S.C. § 1254(1). This brief in opposition is being filed within the 30-day period prescribed by Rule 15 of the Court, as computed in accordance with Rule 30 of the Court.

STATEMENT OF THE CASE

The Petitioner has misstated the factual basis of its federal takings claim; and has misstated the circumstances surrounding the construction of the

off-site improvements on the project that was approved for the previous owner of the property at issue, from whom the Petitioner purchased the property, after the conditions were imposed. The following is an accurate statement of the circumstances surrounding the development of the property at issue.

The first parcel of land at issue in this case (tax lot 801) was purchased by Randal Sebastian from the Willamette Christian Church of West Linn on November 4, 1996, for the price of $862,553. Mr. Sebastian was the sole shareholder and owner of Renaissance Development Corporation (Renaissance), the corporation that was the original developer of the property. (Tr. August 30, p. 125; Respondents' SER-2 (filed in the Ninth Circuit), Deposition of Randal Sebastian, p. 5). The second parcel of land at issue (tax lot 300) was not purchased by Mr. Sebastian until after Renaissance obtained approval of its proposed development. (Respondents' ER-108 (filed in the Ninth Circuit)).

After the purchase of the first parcel, Renaissance began the process of obtaining a development approval from the City of West Linn for the construction of an office complex, which was to be called the West Linn Corporate Park. On December 5, 1996, Randal Sebastian, Pat Sisul (Engineer), and John McGrew (Architect) – appearing for Renaissance – attended a pre-application meeting with employees of the City of West Linn and others to discuss the proposed development. (Respondents' SER-203 to

SER-207; Petitioner's SER-0045 to SER-0046 (filed in the Ninth Circuit)).

At the meeting, the representatives of Renaissance were advised that Renaissance would be required to provide a traffic study to the City in order to determine the impact of the development on off-site intersections. They were also told to have a traffic engineer consider the *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309 (1994) test for constitutionality. (Respondents' SER-203 to SER-207; Petitioner's SER-0046).

A second pre-application meeting was held on April 3, 1997. At this meeting, Renaissance representatives were again informed that a traffic impact analysis would be required. (Respondents' SER-207). There was no dispute among the parties that the proposed development was going to have an impact on traffic.

On August 4, 1997, Mr. Sebastian appeared at a meeting of the Willamette Neighborhood Association in West Linn, Oregon, as a speaker regarding the proposed development. At that meeting, Randal Sebastian informed those present that the development would add to the traffic on 10th Street. (Respondents' SER-211 to SER-212).

While Renaissance was planning its development, Show Timber Development Company (Show Timber) – a neighboring developer owning land to the north of Renaissance's development – was planning a residential development known as the Summerlinn

Apartments. In September 1997, the three parties agreed to jointly fund a traffic study of the 10th Street/I-205 Corridor, which "[was] necessitated as a result of growth feeding additional traffic into the corridor located in the Willamette District of West Linn, Oregon." Renaissance Development Corporation agreed to contribute $4,750 for the study, Show Timber Development Company agreed to contribute $4,750 for the study, and the City of West Linn agreed to contribute $9,500 toward the study. The parties to the agreement had the engineering firm of Kittelson & Associates, Inc., conduct the study. (Respondents' SER-192; SER-258 to SER-259).

By August 22, 1997, the Renaissance representatives were informed that Renaissance and Show Timber could also be required to construct an off-site 20" water transmission main to replace an existing 8" main if a "model" demonstrated that the water impacts of the two developments gave rise to a need for the larger pipe. (Respondents' SER-393).

In November 1997, Kittelson & Associates prepared a transportation impact analysis for Renaissance, which was paid for by Renaissance. (Respondents' SER-339 to SER-391). Kittelson analyzed the traffic impact of the proposed development, excluding the 10th Street intersection. The analysis found that the project had a direct impact on off-site streets and intersections. First, the development took the intersection of 13th Street/Blankenship Road from a level of service (LOS) of "B" to "C." Second, the development took the Albertson's driveway/Blankenship

Road from a LOS of "C" to a LOS of "E." Third, the development took the intersection of Tannler Drive/ Blankenship Road from a LOS of "E" to a LOS "F."

Further, the analysis stated that "[a]dditional impacts to surrounding transportation system specifically, the 10th Street corridor will be addressed in comprehensive transportation impact study that the developer has agreed to participate in." (Respondents' SER-344).

On November 24, 1997, Charles Matschek, an architect with Ankrom Moisan Associated Architects, acting on behalf of Renaissance, submitted to the City a design review application for the proposed development. (Respondents' ER-161 to ER-203).

In February, 1998, Kittelson & Associates, Inc., completed a final report regarding the traffic issues in the 10th Street Corridor. The report described the roadway improvements required as a result of the traffic impact caused by the Summerlinn Apartment Complex and the Renaissance development.

The Kittelson report was in fact a "*Dolan*" analysis; it determined the impacts of the Renaissance development and the street improvements necessary to address those impacts. This is demonstrated by the language of the report itself.

The roadway improvements required by the traffic impact of the two developments are outlined on pages 30-32 of the report (Petitioner's SER-0083 to SER-0085) with the conclusions set forth on page 36

of the report (Petitioner's SER-0089). As was stated in the report:

> "Construction of the West Linn Corporate Park will trigger the need to install a traffic signal at the intersection of 10th Street/ Westbound ramp and at the immediately adjacent intersection of 10th Street/Salamo Road. This pair of traffic signals will be required by the completion of either Summer Linn [sic] Apartments or the West Linn Corporate Park." (Petitioner's SER-0083).

On March 6, 1998, the Planning Director of the City of West Linn approved the Design Review application submitted by Renaissance with conditions of approval. The planning staff had found that the development would "substantially increase the traffic on 13th Street, Blankenship Road and 10th Street to the I-205 freeway on and off-ramps." (Respondents' ER-54). The planning staff also found that the three off-site water transmission main projects that would service the WLCP development had operational and planning criteria deficiencies at the time of the development application. (Respondents' ER-56). Staff therefore recommended that the application be conditioned to finance a review of the proposed water system with Montgomery-Watson to establish the necessary off-site improvements that would have to be constructed. (Respondents' ER-56).

Renaissance's application for the development of the property was approved with conditions by the Planning Director of the City of West Linn on

March 6, 1998. Condition of Approval No. 5 required construction of "the 10th Street corridor street improvements required by the City traffic study currently being developed by the traffic engineering consultant Kittelson & Associates." Condition of Approval No. 10 required the applicant to finance a review of the development's fire and domestic water system by Montgomery-Watson, and to establish all necessary off-site and on-site water improvements for the development. (Respondents' ER-58).

The approval of the application on March 6, 1998, notified Renaissance that an appeal would have to be filed within 14 days of the mailing of the approval. (Respondents' ER-59). Renaissance did not appeal the impositions of the conditions, and it never made any objection to the conditions or sought any variance from the conditions. (Tr. August 30, p. 158).

On March 19, 1998, Patrick Sisul, the engineer for Renaissance, submitted plans to Montgomery-Watson Americas, Inc., in order to obtain the review required by Condition of Approval No. 10. (Respondents' SER-233).

On March 19, 1998, neighboring developers West Linn Associates, LLC, and Albertson's, Inc., filed an appeal of the March 6, 1998, approval of the Renaissance development. After the appeal was filed, hearings were held before the City of West Linn Land Use Hearings Officer on April 15, and May 6, 1998. (Respondents' ER-60).

At the May 6, 1998, hearing, William Cox, the attorney for Renaissance, stated, "the applicant is mitigating the traffic impacts of the proposed development." Cox then called Tom Schwab, an engineer for Kittelson & Associates, Inc., to speak regarding the conditioned improvements along the 10th Street Corridor. Schwab stated that the intersections along the 10th Street Corridor would operate at an acceptable level of service if the conditioned traffic signals were constructed. Schwab also stated that future decreases in level of service would be covered by systems development charges paid by Renaissance and other developers in the area. (Respondents' ER-62).

Randal Sebastian also appeared at the hearing on behalf of Renaissance, and stated that the proposed development would "comply with all of the relevant standards." Rather than object to the conditions of approval, Mr. Sebastian "urged the hearings officer to deny the appeal and uphold the planning director's decision." (Respondents' ER-63). None of the representatives of Renaissance objected to the results of the Kittelson & Associates, Inc., study, or to the application of the results of that study to Condition of Approval No. 5. In fact, the representatives of Renaissance did just the opposite – they defended the Planning Director's decision, and specifically presented Tom Schwab, a Kittelson & Associates engineer, as an expert witness. Mr. Schwab stated on behalf of Renaissance that the 10th Street Corridor intersections would operate at an acceptable level of

service if the two traffic signals were installed. By having Mr. Schwab appear, Renaissance confirmed that it intended to comply with the findings of the Kittelson & Associates study, and the conditions of approval based upon that study. (Respondents' ER-60 to ER-67).

The Land Use Hearings Officer issued a Final Order on May 20, 1998, upholding the Planning Director's decision of March 6, 1998.

In the Final Order, the Hearings Officer modified Condition of Approval No. 5, stating in the Final Order:

> "As noted in the Staff Report, the 10h [sic] Street Corridor study is no longer an 'ongoing' project. This study is complete, and provides a plan for improvements to this corridor to be phased with the proposed development in the area. Condition of approval 5 should be modified to this effect.
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> * * *
>
> 1. Condition of approval 5 is hereby amended to read as follows:
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> * * *
>
> 5. The applicant shall construct the 10th Street corridor street improvements required by the traffic study developed by the traffic engineering consultant Kittleson [sic] & Associates, including construction of two traffic signal lights and associated improvements at the west bound I-205 freeway off-ramp

> & 10th Street and the 10th Street/Salamo Road/Blankenship road intersections, along with a sidewalk on the west side of 10th Street from the River Falls Shopping Center sidewalk and 8th Avenue." (Respondents' ER-64; ER-67).

By the time of the Hearings Officer's Final Order, the Kittelson & Associates study – which the City, Renaissance, and Show Timber had jointly funded – was completed. The Hearings Officer appropriately ordered that the development be conditioned upon construction of the 10th Street improvements mentioned in the Kittelson & Associates, Inc. study, as the parties intended. (Respondents' ER-51 to ER-67).

On August 13, 1998, a public improvement construction permit was issued to Renaissance. (Respondents' ER-204). A building permit application was received by the City on August 24, 1998, and systems development charges (SDC) for the development were calculated.

SDCs were imposed as follows:

Street:	$303,480.22
Storm:	$ 27,097.46
Water:	$ 32,862.00
Sewer:	$ 7,888.00
South Fork:	$ 24,465.00
Total:	**$395,792.68**

(Respondents' SER-220 to SER-232).

Not all of the above SDC liability was to be collected for the City. The $24,465 SDC liability for South Fork was collected for the South Fork Water Board. (Respondents' SER-223 to SER-230). This was not a SDC collected for the benefit of the City. Thus, the total SDCs imposed on the development by the City amounted to $371,327.68.

On August 20, 1998, Montgomery-Watson submitted an analysis for the Willamette Falls Drive transmission main, which was one of the improvements included in Condition of Approval No. 10. Montgomery-Watson did a study of what improvements would be necessary because of the impact of their projects. Montgomery-Watson is a recognized expert in power, water, and wastewater issues. (Respondents' SER-286 to SER-313).

The City had planned to improve the Willamette Falls Drive water transmission line by replacing 4,700 of 8-inch pipeline and 1,100 feet of 10-inch pipeline with a 20-inch pipeline. Montgomery-Watson was asked to determine what, if any, of this planned improvement should be done by Renaissance because of the impact of its project. Montgomery-Watson, by hydraulic analysis, determined that the impact caused by Renaissance could be offset by the replacement of 785 feet of the line. (Respondents' SER-286 to SER-313).

On August 25, 1998, Randal Sebastian of Renaissance Development was advised by the City that Montgomery-Watson had determined the impact of

the WLCP project on the water line to be "785 feet of upgrade from 8" to 20" pipe to the Willamette Falls Drive water transmission line." Thereafter, Renaissance Development Corporation and Show Timber Company decided to jointly complete phase 2A of the upgrade, instead of having Renaissance just do its 785 feet of improvement. (Respondents' SER-288). This decision to upgrade 1,400 feet of water line was not made by the City.

On October 19, 1998, Betty Byron conveyed the second parcel of land needed to construct the West Linn Corporate Park, tax lot 300, to Randal and Sandra Sebastian. The consideration for the conveyance was $655,000. (Respondents' ER-220). This was the second of the two parcels that comprise the WLCP. Thus, as of October 19, 1998, Randal Sebastian (and his wife) owned both parcels of land that were developed as the West Linn Corporate Park.

On October 28, 1998, Randal Sebastian entered into a Public Improvements Guarantee (PIG) agreement with the City of West Linn in order to memorialize the understandings of the parties concerning the development approval and the conditions applicable to the approval. In the PIG agreement, Mr. Sebastian assured the City that the public improvements would be completed:

> "The land use approval for the project requires Developer to construct certain public improvements (the 'required public improvements') as a condition of the approval. Public improvements are items that Developer is

> required to construct and dedicate or otherwise transfer to the City. The land use approval also requires Developer to provide adequate assurances that the required public improvements will be satisfactorily completed. This agreement is intended to provide adequate assurances that the required public improvements will be completed." (Respondents' ER-214).

Under the PIG Agreement, the City of West Linn obligated itself to "process Developer's public improvements construction plans for the Project." In addition, the City agreed to "process the Developer's request for building permits." The developer agreed to "complete all required public improvements on or before October 15, 1999, and/or before any occupancy permits are issued." The PIG Agreement then described the conditioned public improvements that the developer agreed to construct:

> "The public improvements include those which are to be constructed on the frontage of the subject property. In particular this means the public improvements which are to be constructed within 13th Street and also within Blankenship Road. . . . In addition to these improvements, the Developer shall also construct the off site improvements which have been included in the land use conditions of approval. These improvements include the waterline improvements within Green [sic] Street, the waterline improvements in Willamette Falls Drive, the 10th Street Corridor improvements which include

> two traffic signal lights, improvements to the westbound I-205 ramps and 10th Street intersection, improvements to the 10th Street, Blankenship and Salamo Road intersection, the construction of a sidewalk on the west side of 10th Street from the River Falls Shopping Center to 8th Avenue, and the gravel path within the Greene Street vacation area." (Respondents' ER-214).

The PIG Agreement also required the developer to "arrange a cash escrow, bond, or equivalent security to secure the faithful performance of its obligations under this agreement." (Respondents' ER-215).

Pursuant to the authority given in ORS 223.297 to ORS 223.314, the City of West Linn had codified its System Development program in West Linn Code, 4.400 to 4.485. Pursuant to the West Linn Code, on October 19, 1998, Randal Sebastian submitted an application for deferral of SDCs based upon the value of the public improvements that were to be constructed. (Respondents' SER-195; SER-197). Mr. Sebastian's application was approved, and the SDCs imposed on the petitioner were deferred in the amounts of $190,928 in Street SDCs and $22,320 in Water SDCs. (Respondents' SER-195).

On October 22, 1998, Randal Sebastian submitted performance bonds to the City of West Linn guaranteeing performance of the PIG agreement, including construction of the 10th Street improvements from Salamo Road to Willamette Falls Drive, the WLCP site, Blankenship Road Frontage Improvement

Street SDC Project Number 28, and the Willamette Falls Drive Transmission Main Phase 2 – Water SDC Project Number 2. (Respondents' ER-205 to ER-212).

On November 24, 1998, plans for the various public improvements for the project were approved for construction by Wally Koch, the City's Public Improvement Manager, and building permits were issued to Randal Sebastian. (Respondents' SER-220 to SER-232; SER-234). When Mr. Sebastian picked up his building permits, he gave to the City SDC Credit Certificates that had a face value of $96,502.75. (Respondents' SER-232). These credits were used to further reduce Mr. Sebastian's remaining SDC liability by $96,502.75.

The City gave full credit for the certificates towards Mr. Sebastian's Street SDC liability, even though Randal Sebastian had only paid $82,027.34 for the certificates (Respondents' SER-232; Tr. August 30, p.160). From these certificates, $95,248.52 was used to offset Mr. Sebastian's Street SDC liability. The remaining portion of the credit certificates, $1,254.23, was refunded to Mr. Sebastian. (Respondents' SER-231).

In addition, Mr. Sebastian paid cash in the amount of $87,296.16 towards the remainder of his SDC liability. This left a SDC balance owed to the City of $213,248 ($395,792.68-$182,544.68). This was the amount previously deferred by the City on the basis of the value of the improvements that were to be constructed. Even though this amount was due at

the time of obtaining the permits, the City, in reliance upon its agreements with Mr. Sebastian to construct the public improvements, had already agreed that Mr. Sebastian could defer the rest of his SDC liability until he had completed the public improvements. This agreement to defer payments was made at the request of Mr. Sebastian. (Respondents' SER-197 to SER-202).

Also, on November 24, 1998, Renaissance paid cash in the sum of $87,881.16 for non-SDC construction fees as follows:

> (1) $3,336.35 for Building Permit Fees which is documented on Receipt No. 917039 (Respondents' ER-40);
>
> (2) $77,775.62 for Construction Fees which is documented on Receipt 917040 (Respondents' SER-229). (A list of these non-SDC fees are set forth in Respondents' SER-228); and,
>
> (3) $6,769.19 for Construction Fees which is documented on Receipt 917041 (Respondents' SER-222). (A list of these non-SDC fees is set forth in Respondents' SER-221).

The cash paid for SDCs in the amount of $87,296.16, and the cash paid for Construction fees other than SDCs in the amount of $87,881.16 were paid by Renaissance by Check No. 1311 which is in the amount of $175,177.32 ($87,296.16 + $87,881.16). (Respondents' SER-4).

Thus, as of November 24, 1998, Renaissance had a balance owing for SDCs in the amount of $213,248. That amount was deferred pending construction of the off-site improvements.

Randal Sebastian then sold both of his parcels of land which had been approved for the development of the WLCP to Nielson Properties, LLC, on December 18, 1998, for $2,100,000. (Respondents' SER-394 to SER-395). Mr. Sebastian had purchased tax lot 801 in 1996, for the sum of $862,553. (Respondents' ER-218). Mr. Sebastian had then purchased tax lot 300 from Mr. and Mrs. Byron in October of 1998 for $655,000. Thus, the total amount paid for the property by Mr. and Mrs. Sebastian was $1,517,553. Mr. Sebastian therefore recognized a profit of $582,447, on the sale of the property to Nielson Properties, LLC, after all of the off-site improvement conditions had been imposed more than nine months earlier. Further, at the time that Mr. Sebastian sold the property, the system development charges had already been imposed.

Three days later, on December 21, 1998, the development property was then conveyed to the Petitioner, West Linn Corporate Park, LLC, as a capital contribution. The deed again listed the value of the property as $2,100,000 (Respondents' SER-335). Thus, the Petitioner in this lawsuit did not own the property that is the subject of this lawsuit until more than nine months after the development had been approved with the conditions that the Petitioner alleges are unconstitutional in the case at bar. And, at no time thereafter was any appeal taken from the

decision imposing the conditions by Renaissance, Mr. Sebastian, or Petitioner, nor was there ever any variance sought from the conditions by Renaissance, Mr. Sebastian, or Petitioner.

After the property was purchased by the Petitioner, construction of the various public improvements began and proceeded over the next several months. During this time, the Petitioner never made any objection to the conditions of approval and never attempted to obtain any modification of the conditions of approval, even though it had purchased the property with full knowledge of the conditions applicable to the property.

On September 22, 2000, the Petitioner submitted a request for SDC credit reimbursements for the costs of improvements constructed off site as set forth in the PIG agreement. (Respondents' SER-218). On November 29, 2000, the following Credit Certificates were issued to the Petitioner:

> "(1) Street SDC Credit Certificate No. CW-01-1413 in the amount of $53,766.11;
>
> (2) Street SDC Credit Certificate No. CW-01-1414 in the amount of $190,928;
>
> (3) Street SDC Credit Certificate No. CW-01-1415 in the amount of $144,514.81;
>
> (4) Water SDC Credit Certificate No. CW-01-412 in the amount of $169,049.67;
>
> (5) Water SDC Credit Certificate No. CW-01-413 in the amount of $20,479.06

(6) Water SDC Credit Certificate No. CW-01-414 in the amount of $17,120." (Respondents' SER-52 to SER-53; SER-235 to SER-239).

The above certificates total $595,857.65. In addition, a credit certificate was later issued for the Greene Street Trail Improvement in the amount of $12,155.07. (Respondents' SER-392).

Each certificate is good for 10 years, and states: "The credit recipient and any transferee agree to indemnify, defend and hold harmless the City from and against any and all claims, actions or damages arising out of the City's issuance . . . of this credit." (Respondents' SER-235 to SER-239). Thus, the Petitioner agreed to hold the City harmless from any damages it incurred arising out of the issuance of the credits. Each certificate also states: "This Credit is not refundable for cash . . . [.]" (Respondents' SER-235 to SER-239).

Of the $595,857.65 in credits given, the City kept Street SDC Certificate No. CW-01-1414 in the amount of $190,928 as payment towards the outstanding balance of SDCs owed to the City. The City gave dollar for dollar credit for the certificate. (Respondents' SER-52 to SER-53). In addition, the City kept Water SDC Certificate No. CW-01-413 in the amount of $20,479.06 as payment towards the outstanding balance of SDCs owed to the City. The City gave dollar for dollar credit for this certificate as well. (Respondents' SER-52).

In other words, as of November 24, 1998, Renaissance had a balance owing for SDCs in the amount of $213,248. For the next two years, this amount remained unpaid. The City did not increase this amount owed by charging any interest. Then in November of 2000, the City kept Certificates CW-01-1414 and CW-01-413 in the total amount of $211,407.06 and applied that to the balance owing of $213,248, leaving a balance owing of $1,840.94. Apparently, this amount is still owed.

Thus, after the credits were issued and two certificates were kept as payment of the owed SDCs, the Petitioner retained a total of $384,450.59 in street and water certificates, and then an additional $12,155.07 in park certificates.

Of the total SDC cash liability imposed on the WLCP project in the amount of $395,792.68, $306,655.58 was paid in credits, dollar for dollar. But for the credits, the developers would have been required to pay cash in the amount of $395,792.68.

Various certificates of occupancy – temporary and final – were issued for the buildings at the WLCP site from March 24, 2000, through May 14, 2002. (Respondents' SER-240 to SER-257). The Corporate Park is now occupied by tenants, and Petitioner is receiving rental income from the tenants. (Respondents' SER-281 to SER-285).

ARGUMENT

I. Introduction.

As previously stated, the questions presented to this Court by the Petitioner are irrelevant because they are not based upon the actual facts in the case at bar; and they mislead one into thinking that the Petitioner was not compensated for the off-site improvements it constructed pursuant to a Public Improvements Guarantee agreement entered into with the City of West Linn. In addition, the district court's decision that the Petitioner's federal takings claim is not ripe has not been overturned; thus, the Petitioner's questions are immaterial, and any answer to the questions do not reverse the judgment entered against Petitioner on the federal takings claim because the City still prevails. Thus, unless this Court wants to issue an advisory opinion that does not affect the judgment entered against the Petitioner, this Petition for a Writ must be denied.

One does not even get to the type of questions presented by the Petitioner until a developer has been required to construct off-site improvements without compensation, and until the case is ripe for adjudication in federal court. The undisputed facts in the case at bar are that the Petitioner was paid for the construction of the off-site improvements at issue with SDC credits requested by the Petitioner and issued by the City, and that the Petitioner's federal takings claim is not ripe because neither the Petitioner nor the original developer of the land

availed themselves of any of the administrative remedies through which the City might reach a final decision regarding the conditions imposed upon the development that constituted the alleged taking.

In the case at bar, the original purchaser of the property sought development of the property, and pursuant to a Public Improvements Guarantee (PIG) agreement, agreed to the construction of off-site improvements in exchange for the payment of SDC credits issued pursuant to Oregon's statutory scheme (ORS 223.297 to ORS 223.314) of providing reimbursements for the construction of off-site improvements with SDC credits. Then, after obtaining approval for the development with the agreement to construct off-site improvements, the original owner and developer of the property sold the property for a profit to the Petitioner. The Petitioner then constructed the off-site improvements pursuant to the PIG agreement with the City, and requested, and then accepted SDC credits as payment for the off-site improvements. Thus, if the Court is going to grant a Writ in this case, the correct question in the case at bar is as follows:

> (1) Can a second developer that purchases property from an original developer claim it has been subjected to an exaction for constructing off-site improvements, when the property was purchased after the conditions were imposed, and where there never was any objections or appeal of the conditions imposed by either the original developer or

the second developer, and when the second developer was compensated for the off-site improvements at its request with SDC credits issued pursuant to ORS 223.297 to ORS 223.314 and the codes of the City of West Linn.

The answer to this question is no because:

a. The lawsuit was not ripe because neither developer availed themselves of any of the administrative remedies through which the City might reach a final decision regarding the conditions imposed upon the development that constituted the alleged taking;

b. The second developer purchased the property with the conditions imposed and after the alleged taking occurred; thus, the second developer is precluded from making a Fifth Amendment takings claim;

c. Just compensation was paid for the off-site improvements with SDC credits requested by the Petitioner, and issued by the City pursuant to a legislative statutory scheme, ORS 223.297 to ORS 223.314; and

d. A condition of development that requires a developer to construct off-site improvements with its own money, as opposed to dedicating an interest in real property, is not a physical taking recognized by the Fifth Amendment.

II. The Petition for a Writ Should be Denied Because the Claim is not Ripe, and Answers to the Questions Proposed by the Petitioner do not Reverse the Judgment Entered Against Petitioner on the Federal Takings Claim Because the City Still Prevails.

In order for a claim to be ripe under the Fifth Amendment in a claim against a city, a landowner must do two things. First, the landowner must have availed himself of all the administrative remedies through which the city might reach a final decision regarding the conditions imposed upon the development that constituted the alleged taking by appealing the decision and/or seeking a variance from the objectionable condition. Second, the landowner must give a court the opportunity to award just compensation pursuant to a state claim for inverse condemnation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-194, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985).

As stated in *Palazzolo v. Rhode Island*, 533 U.S. 620-621, 121 S. Ct. 2448 (2001):

> "These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in

> burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736, and n.10, 117 S. Ct. 1659, 137 L.Ed.2d 980 (1997) (noting difficulty of demonstrating that 'mere enactment' of regulations restricting land use effects a taking)." *Palazzolo v. Rhode Island*, 533 U.S. 620-621, 121 S. Ct. 2448 (2001).

In this case, the Petitioner did not avail itself of all the administrative remedies afforded by the City of West Linn; therefore, Petitioner's claim is not ripe. Furthermore, at trial in the district court, the trial court dismissed the Petitioner's federal takings claim because it was not ripe. That decision has never been overturned. As stated by the trial court, Petitioner's App. at 6a:

> "My conclusions of law are plaintiff's federal taking claim is not ripe under the ... *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, ... Plaintiff's failure to pursue remedies available under state law bars its federal takings claim and, consequently, defendant is entitled to

> judgment in its favor on plaintiff's claim under the United States Constitution. *Pascoag Reservoir and Dam v. Rhode Island*, 337 F.3d 87, and *Gamble v. Eau Claire County*, 5 F.3d 285."

Because the Petitioner's takings claim is not ripe, any answer to the questions posed by the Petitioner are immaterial and will have no impact on the judgment entered in this case in favor of the City of West Linn on the finding by the district court that the Petitioner's claim was not ripe. Therefore, since the answers to the questions are immaterial, this Court should deny the Petition for Writ of Certiorari.

III. The Petition for a Writ Should be Denied Because the Petitioner Purchased the Property Nine Months After the Conditions were Imposed and with the Knowledge that the Conditions were Imposed; Thus, the Petitioner is Precluded from Making a Fifth Amendment Takings Claim.

It is undisputed that the Petitioner did not purchase the property at issue until after the conditions of approval were imposed, including those which required the construction of off-site improvements. Petitioner's claim of a taking of its property is barred by the rule that a subsequent purchaser of property cannot bring a suit for just compensation, because the purchaser is deemed to have paid a price for the property that reflects the market value of property, minus the interests taken by the City. *Daniel v.*

County of Santa Barbara, 288 F.3d 375, 383-384 (9th Cir. 2002).

Thus, again, the City prevails in the case at bar regardless of the answers to the questions posed by the Petitioner; therefore, since the answers to Petitioner's questions are immaterial, and will not change the outcome of the case, this Court should deny the Petition for Writ of Certiorari.

IV. The Petition for a Writ Should be Denied Because Just Compensation was Paid for the Off-Site Improvements with SDC Credits Requested by the Petitioner, and Issued by the City Pursuant to an Oregon Statutory Scheme, ORS 223.297 to ORS 223.314.

First, a developer that affirmatively and voluntarily enters into a binding, written contract to pay for off-site improvements cannot claim a condition has been "exacted" from it. Secondly, the statutory provisions of ORS 223.297 to ORS 223.314 and the provisions of the West Linn Code based upon the authority provided in ORS 223.297 to ORS 223.314 are not exactions; therefore, once a developer voluntarily agrees to construct off-site improvements in exchange for SDC credits pursuant to the provision of codes based upon ORS 223.297 to ORS 223.314, the developer no longer can claim that it was subjected to an exaction. *Homebuilders Ass'n v. City of West Linn*, 204 Or. App. 655, 657, 131 P.3d 805 (2006); *Homebuilders Assn. v. Tualatin Hills Park Rec.*, 185 Or. App. 729, 734-735, 62 P.3d 404 (2003); (system

development charge that required developers to pay a fee calculated by means of a carefully determined formula based on impact that development will have on infrastructure is not subject to *Dolan*'s rough proportionality test). *Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369, 45 P.3d 966, *rev. den.*, 334 Or. 492, 52 P.3d 1057 (2002). As stated in *Homebuilders Assn. v. Tualatin Hills Park Rec.*:

> "We begin with the Oregon constitutional claim. That claim might be interpreted in two ways. First, it might be a claim that, by requiring plaintiffs to pay an SDC as a condition of developing their real property, the district imposes a regulatory taking of a portion of that property because exacting the charge reduces the property's value. Even if we were to assume that exacting money as a condition of development could be considered a regulatory taking for purposes of Article I, section 18 – an issue we emphatically do not decide – plaintiffs' claim would fail. The Oregon Supreme Court has not created exceptions to the general rule that, in order to establish a regulatory taking under Article I, section 18, a property owner must show that the government has deprived the owner of 'all substantial beneficial or economically viable use of the property.' *Deupree v. ODOT*, 173 Or. App. 623, 630, 22 P.3d 773 (2001), *rev. den.*, 334 Or. 397, 52 P.3d 435 (2002) ('[A] regulatory taking under Article I, section 18, occurs only where the property owner is deprived of all substantial beneficial or economically viable use of the property.').

> Plaintiffs do not, and could not, allege that conditioning the development of their real property on payment of an SDC rendered the real property devoid of all economically viable use.
>
> Alternatively, plaintiffs' argument could be that, in imposing the SDC, the district appropriates plaintiffs' money and that act itself amounts to a taking, regardless of its connection to the development of their real property. Under that theory, in other words, the unconstitutional taking is the taking of money and not the reduction in the value of real property. Plaintiffs, however, offer no arguments demonstrating that Article I, section 18, would support such a sweeping conclusion – one that would, for example, subject the income tax to a takings attack. No Oregon court has ever suggested that a legislatively imposed exaction of money, applicable generally to a large group of people, can be challenged as a taking and, in the absence of arguments to that effect, we will not reach such a radical conclusion. The trial court did not err in granting the district's motion for summary judgment insofar as it was directed at plaintiffs' claims under the Oregon Constitution."

An exaction is the act of demanding and obtaining property from another without the other's consent or agreement. An exaction does not take place when one voluntarily enters into a written contract supported by consideration. Nor can an exaction ever

take place when you apply for and receive SDC credits as payment for the off-site improvements when the acceptance of the SDC credits expressly provides that: "The credit recipient and any transferee agree to indemnify, defend and hold harmless the City from and against any and all claims, actions or damages arising out of the City's issuance . . . of this credit." (Respondents' SER-235 to SER-239). Each certificate also states: "This Credit is not refundable for cash. . . [.]" (Respondents' SER-235 to SER-239).

The case at bar is not a situation where conditions were imposed upon a developer and the developer protested the conditions, or appealed the conditions. Nor is it a situation where the developer just carried out conditions in silence and without an affirmative act or agreement. Nor is it a situation where a developer was not compensated for the construction of off-site improvements. Rather, this is a situation that (1) when a neighbor opposed the development, the developer told the hearings officer that he was going to pay for off-site improvements; (2) the developer then entered into a written contract agreeing to construct the improvements; (3) the developer then was granted its request to defer money due at the time for the construction of the development (deferred SDC payments); and, (4) the developer then accepted SDC credits as payment for the off-site improvements. There is simply no exaction involved in the case at bar. *L.A. Development v. City of Sherwood*, 159 Or. App. 125, 977 P.2d 392, *rev. den.*, 329 Or. 61, 994 P.2d 120 (1999), *cert. den.*, 528 U.S.

1075, 120 S. Ct. 788, 145 L.Ed.2d 665 (2000) (same). And furthermore, if there was an exaction, the Petitioner was fully compensated by asking for, and receiving SDC credits. Thus, because the Petitioner was compensated for the construction of off-site improvements, the answer to the questions posed by the Petitioner are meaningless since there is no need to determine if the Fifth Amendment applies to the case when there was no taking of property without compensation.

V. The Petition for a Writ Should be Denied Because a Condition of Development that Requires a Developer to Construct Off-Site Improvements with its Own Money, as Opposed to Dedicating an Interest in Real Property, is not a Physical Taking Recognized by the Fifth Amendment.

The Oregon Supreme Court's opinion answering the Ninth Circuit's three certified questions addresses this issue with an excellent analysis of the law. *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P.3d 29 (2010). The Ninth Circuit correctly agreed. Nothing is gained by repeating this analysis again. Defendants rely upon those excellent opinions.

Petitioner maintains that the Ninth Circuit's conclusion in this case directly conflicts with decisions of other courts, including the California and Texas Supreme Courts. (Petition at 23). Petitioner first discusses *Ehrlich v. City of Culver*, 12 Cal. 4th 854, 911 P.2d 429 (1996), in which the California Supreme

Court held that the heightened level of judicial scrutiny applied to challenges to possessory exactions required by local governments as a condition for approving development permits also apply when a property owner challenges monetary exactions, where such exactions are imposed on an individual and discretionary basis. *Id.* at 876, 911 P.2d at 444. Petitioner also cites *Flower Mound Texas v. Stafford Estate Ltd., Partnerships*, 135 S.W.3d 620 (Tex. 2004) in which, as petitioner asserts, the Texas Supreme Court "followed *Ehrlich* and took the same view."

Petitioner reliance on *Ehrlich,* and its progeny, as a compelling basis for this Court to accept review of the Ninth Circuit's decision in the present case is fundamentally flawed. This 15-year-old California decision predates much of the subsequent jurisprudence on the scope of the *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987)/ *Dolan* doctrine of unconstitutional conditions – most importantly, this Court's 2005 decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005) which limited the scope of *Nollan* and *Dolan*, explaining that they represented a special application of the doctrine of "unconstitutional conditions," as opposed to carving out of a new branch of "takings" jurisprudence. *Flower Mound Texas* suffers the same defect as it also predates *Lingle.*

Petitioner also cites *St. Johns River Water Management Dist. v. Koontz*, 5 So. 3d 8 (Fla. App. 5th Dist. 2009) as an example of a more recent case that has "followed the lead of *Ehrlich* and *Flower Mound*," and

applied the requirements of *Nollan* and *Dolan* to exactions not involving the dedication of real property. Although *St. Johns River* was decided after *Lingle*, it notably makes no mention of this case. Moreover, *St. John's River* primarily relied on the fact that this Court had granted a petition for a writ of certiorari on an earlier appellate decision in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993).

> "In *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S. Ct. 2731, 129 L.Ed.2d 854 ([June 27,] 1994), the city conditioned a permit on the payment of money to build tennis courts and purchase artwork. Although the state appellate court upheld the imposition of the conditions, the [U.S.] Supreme Court vacated the decision and remanded the case to the state court to reexamine it in light of *Dolan*." *St. Johns River*, 5 So. 3d at 12.

Based on this court's decision to remand the original *Ehrlich* decision in light of its three-day old decision in *Dolan* (decided June 24, 1994), the Florida appellate court presumed that this Court "has already implicitly decided this issue" – *i.e.* that there is no difference between exactions involving a physical dedication of land and those that require the payment of money. This represents outright judicial "projection" by the Florida Appellate court, which is unsupported by this Court's summary analysis:

> "The judgment is vacated and the case is remanded to the Court of Appeal of California,

> Second Appellate District, for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994)." *Ehrlich*, 512 U.S. at 1231, 114 S. Ct. at 2731-32.

Moreover, even if this projection about this Court "implicitly decided" in *Ehrlich* may have been reasonable in 1994, its validity has been undermined – if not annulled – by this Court's later decision in *Lingle*.

Following *Lingle*, the California Court of Appeals questioned whether this Court's takings jurisprudence applied to "monetary" exactions, in a case that acknowledged the California Supreme Court's decision in *Ehrlich* from ten years earlier. *Small Property Owners of San Francisco v. City and County of San Francisco*, 141 Cal. App. 4th 1388, 47 Cal. Rptr. 3d 121 (2006). As the California appellate court posited:

> "We note that the application of the Takings Clause to regulations mandating only the payment of money leads to odd results. The Takings Clause does not prohibit government from taking property, but merely requires the government to pay a just price for doing so. (*Brown* [*v. Legal Foundation of Washington*], 538 U.S. [216,] 235, 123 S. Ct. 1406.) *Applying the Takings Clause to regulations that merely require the payment of money is like saying the government can take money, but only if it pays it back.* It is far more logical to conclude that a regulation of this sort might be declared invalid as a violation of due process, than that the government

> should give back the money it legitimately took. (*See Homebuilders Assn. v. Tualatin Hills Park* (2003) 185 Or. App. 729, 62 P.3d 404, 411). (Emphasis supplied)." *Id.* at 1401 n.6, 47 Cal. Rptr. 3d at 129.

In this footnote, the California court also quoted this Court's observation in *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 110 S. Ct. 387 (1989) that "[u]nlike real or personal property, *money is fungible*." (Emphasis supplied).

Thus, even if this Court were to get to the answer of the questions posed by the Petitioner, the Writ should be denied because this Court has already recognized in *Lingle* that the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* do not apply to the requirement of the payment of off-site improvements.

CONCLUSION

This Court should deny Petitioner's request for a Writ of Certiorari. The answers to the proposed questions are immaterial because Petitioner's takings claim is not ripe; Petitioner purchased the property nine months after the conditions were imposed; just compensation was paid for the off-site improvements with SDC credits requested by the Petitioner; there is no conflict among the circuits that the payment of off-site improvements with SDC credits is a taking protected by the Fifth Amendment; and this Court

has already recognized in *Lingle* that the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* do not apply to the payment of off-site improvements.

Respectfully submitted,

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No. 11-299

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Petitioner,
v.
CITY OF WEST LINN, BORIS PIATSKI
and DOE DEFENDANTS 1 THROUGH 10,
Respondents.

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 11th day of October, 2011, send out from Omaha, NE 1 package(s) containing 3 copies of the BRIEF IN OPPOSITION in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 11th day of October, 2011.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2014

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF IN OPPOSITION in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 7824 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 11th day of October, 2011.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2014

Andrew Cockle
Notary Public

Patricia C. Billotte
Affiant

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