No. 11-___

IN THE

# Supreme Court of the United States

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WEST LINN CORPORATE PARK L.L.C.,
*Petitioner*,

v.

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

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Local governments frequently require property owners to dedicate private property to public use as a condition for governmental approval of discretionary property development permits. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court held that such adjudicative property exactions violate the Fifth Amendment to the United States Constitution as uncompensated takings unless an "essential nexus" exists between the property exaction and a legitimate state interest, and the property exaction is "roughly proportional" to the projected impact of the development. In this case, a local governmental entity required petitioner to construct and dedicate numerous off-site physical improvements on public property as a condition for governmental approval of discretionary permits to develop petitioner's property notwithstanding the absence of proportionality between the property exacted and the projected impact of the development. The two questions presented are:

1. Do the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* apply equally to exactions of personal property as they do to exactions of real property?

2. Did the court below misconstrue this Court's decision in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), when it refused to apply the protection of the Fifth Amendment to an exaction of personal property?

## RULE 14.1(b) STATEMENT OF PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. West Linn Corporate Park, L.L.C., Plaintiff-Appellee/Cross-Appellant
2. City of West Linn, Defendant-Appellant/ Cross-Appellee
3. Boris Piatski, Defendant-Appellant/Cross-Appellee
4. Doe Defendants, 1 through 10, Defendants-Appellants/Cross-Appellees

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner West Linn Corporate Park, L.L.C. is an Oregon limited liability corporation. Petitioner has no parent corporation, is not publicly held, and no publicly-held corporation owns 10% or more of its stock.

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MISCELLANEOUS

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CITY OF WEST LINN, BORIS PIATSKI and
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

West Linn Corporate Park, L.L.C. ("WLCP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is unreported. (App., *infra*, 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). (App., *infra*, 22a-51a.) That opinion certified three questions of Oregon land-use law to the Oregon Supreme

Court under the certification procedure prescribed by Or. Rev. Stat. § 28.200 *et seq*. 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*, 240 P.3d 29 (Or. 2010). (App., *infra*, 52a-117a.) The Ninth Circuit's subsequent opinion is reported at *West Linn Corporate Park L.L.C. v. City of West Linn*, 2011 U.S. App. LEXIS 7911 (9th Cir. Apr. 18, 2011). (App., *infra*, 118a-125a.)

## 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 for rehearing *en banc* on June 7, 2011. (App., *infra*, 126a-127a). The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE CASE

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court instructed that the Takings Clause of the Fifth Amendment to the United States Constitution does not allow a governmental entity to exact property as a condition for discretionary approval of a land development permit unless the

exaction has an essential nexus with, and is roughly proportional to, the impact of the proposed development. In applying *Nollan* and *Dolan* over the years, courts have become deeply divided over the threshold question of what property exactions trigger the protection of the Takings Clause and the application of the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan*. In this case, the Ninth Circuit took the narrow view – shared by some courts – that the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* apply to only cases in which the governmental entity has conditioned the approval of a development permit on the dedication of real property to the public. But other courts have taken the exact opposite view, concluding that the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* apply broadly to all property exactions, including exactions requiring property owners to dedicate other goods or services to the public or to make monetary payments.

This conflict is significant. Property exactions are imposed routinely as conditions for development permits, making this issue arise frequently in both state courts and lower federal courts. The different views have caused significant uncertainty about the constitutional limitations on such exactions and have resulted in a lack of uniformity in the treatment of federal takings claims. Because the conflict is unlikely to be resolved without clarification from this Court, this Court should grant review to address the application of the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* to exactions that do not involve the dedication of real property.

## A. Factual Background

Petitioner WLCP is an Oregon limited liability company engaged in the business of commercial land development and commercial leasing. WLCP owns real property in West Linn, Oregon that is zoned for commercial development. This case concerns exactions – amounting to a total of $824,452.00 – that respondent City of West Linn ("the City") imposed as conditions for WLCP and its predecessor-in-interest to develop the property into a corporate office park.

**Development History.** WLCP's predecessor-in-interest started the effort to develop WLCP's property into a corporate office park in 1996. (App., *infra*, 26a.) After participating in various planning meetings with the City and complying with numerous pre-application requirements, WLCP's predecessor-in-interest provided the City with final design plans for developing the property in November 1997. (App., *infra*, 26a.) In March 1998, the City approved the design with numerous conditions, including conditions requiring the construction and delivery of numerous on-site and off-site public improvements to the City. (App., *infra*, 26a-30a.)

Following the City's conditional approval of the project, the property was transferred from WLCP's predecessor-in-interest to WLCP. (App., *infra*, 30a.) WLCP was then required to sign a Public Improvements Guarantee (or "PIG") with the City to obtain permission for the proposed development. (App., *infra*, 30a-31a.) The PIG memorialized the conditions for the development and required WLCP to secure its performance of the various off-site public improvement projects with a $264,000 performance bond. (App., *infra*, 31a.)

Around the same time that WLCP's property was being developed, other nearby properties also were being developed. (App., *infra*, 26a.) On the lot immediately south of WLCP's property, a national grocery store chain was developing a large shopping center. (Ninth Circuit Supplemental Excerpt of Record 0048.) On the lot immediately north of WLCP's property, a company named Show Timber was developing a 438-unit residential complex called the Summerlinn Apartments. (App., *infra*, 26a.) In imposing the conditions on the development of WLCP's property, the City made no findings about the projected impact of the WLCP project as compared to other developments in the area. The City also made no findings whether the conditions that it imposed for the WLCP project were related and roughly proportional to the projected impact of the project.

**Required Public Improvement Projects.** The public improvement conditions for approval of the WLCP project included on-site public improvements along the frontage of WLCP's property, including waterlines within those streets. (App., *infra*, 26a-31a.) In addition, the City also required WLCP to complete numerous costly public improvement projects, which were not located on WLCP's property but which were located on nearby public property. (App., *infra*, 26a-31a.) The City's conditioning of WLCP's development permit on the construction and delivery of those off-site public improvements – without any consideration of whether the required off-site public improvements were related and roughly proportional to the projected impact of WLCP's corporate office park – forms the basis of WLCP's takings claims in this case.

**Willamette Falls Drive Waterline Project.** One of the required off-site public improvement projects was the construction of the second phase of a major waterline for the City called the Willamette Falls Drive waterline. (App., *infra*, 32a.) When the City initially required the construction and delivery of Phase II of the Willamette Falls Drive waterline as a condition for the development of WLCP's property, the City represented that the waterline could be build along a stretch of land underneath transmission lines that the City had already engineered. (App., *infra*, 32a.) Based on that construction plan, the City claimed that WLCP's cost for completing the off-site public improvement would be virtually only the cost of installing the pipe. (App., *infra*, 32a.)

Contrary to the City's initial representations, the City ultimately required WLCP to construct approximately 1,400 feet of waterline through a stretch of solid rock along Willamette Falls Drive. (App., *infra*, 32a.) WLCP was able to split the cost of this substantial project with Show Timber because the City separately required Show Timber to construct the same waterline in order for Show Timber to obtain approval for development of Show Timber's residential complex. (App., *infra*, 31a-32a.) Even splitting the cost with Show Timber, the total cost to WLCP for the Willamette Falls Drive waterline project was $172,049. (App., *infra*, 32a.) Because the City conditioned WLCP's development permit on the construction of the Willamette Falls Drive waterline project separately from Show Timber, WLCP would have been liable for the entire cost of the project if Show Timber had been unwilling or unable to contribute to the project.

In addition to the significant cost for the required Willamette Falls Drive waterline project, the uncontroverted evidence at trial revealed that the City's own experts determined that any impact from WLCP's project actually required only minimal waterline upgrades. As a condition for approval, WLCP was required to finance a review by the City's water engineer about the off-site and on-site improvements that would be needed for WLCP's project, including the construction of Phase II of the Willamette Falls Drive waterline. (App., *infra*, 29a.) That review showed that the requirements imposed on WLCP were grossly disproportional to the projected impact of its development.

In April 1998, the City's water expert issued a memorandum stating that no additional improvements were needed for WLCP's project, other than the construction of a waterline to the property on Greene Street. (Tr. Ex. 144 at p. 3.) A month later, in May 1998, the City's water expert issued a second memorandum, this time stating that any exacerbation of hydraulic deficiency from both WLCP's project and Show Timber's Summerlinn Apartments project could be solved by adding less than 100 feet of waterline. (Tr. Ex. 178 at p. 2.) That same memorandum went on to suggest that, divided according to customer demand, the Summerlinn Apartment project and WLPC's project would account for only 15 percent of the water demand and, thus, should be responsible for approximately 600 feet of the proposed Willamette Falls Drive waterline. (Tr. Ex. 178 at p. 2.) Notably, that conclusion did not consider any differences in expected water usage between Show Timber's 438-unit residential Summerlinn Apartments and WLCP's commercial offices. The uncontradicted evidence at trial estab-

lished that the impact from a large apartment complex like Summerlinn Apartments would be almost six or seven times higher than the impact from a corporate office park development like the WLCP project. Thus, although the City required WLCP to share the construction costs of 1,400 feet of waterline – at a total cost to WLCP of $172,049 – the City's own experts had advised the City that the project was not necessitated by any impact from the WLCP project, and the uncontradicted evidence at trial further showed that the impact from the commercial development of WLCP's property was substantially less than the impact from the residential development of Show Timber's property.

**Other Public Improvement Projects.** In addition to the construction of Phase II of the Willamette Falls Drive waterline, the City also conditioned the approval of WLCP's development permit on the construction or the funding of numerous other off-site public improvement projects. Among other things, the City required WLCP to partially fund a traffic study by the City on the nearby 10th Street corridor to develop a long-term plan of needs for the 10th Street corridor in anticipation of a full build-out of all properties in the area by 2018. (App., *infra*, 27a-28a.) The study recommended the addition of two new traffic signals, along with a sidewalk on the west side of 10th Street, in view of the construction of the WLCP project and Summerlinn Apartments. (App., *infra*, 31a.) The study concluded that "[n]o additional roadway work" was necessary to accommodate the WLCP project. (App., *infra*, 31a.) The study further determined that WLCP's commercial project would generate only 5.4 percent of the afternoon peak hour vehicles entering the 10th Street corridor with full occupancy of the surrounding properties in 2018.

(App., *infra*, 31a.) The study also determined that WLCP's project would generate only 3.3 percent of the afternoon peak hour vehicles on the westbound I-205 ramps. (App., *infra*, 31a.)

Notwithstanding the conclusions of the study, the City ultimately required WLCP to complete all of the 10th Street improvements recommended for the future development of the area, including: (1) improvements to the westbound I-205 ramps and 10th Street intersection; (2) additional street widening; (3) construction of additional turn lanes; (4) storm drain improvements; (5) installation of a bike path; (6) relocation of street lighting; (7) relocation of power and telephone utilities; and (8) installation of new curbs. (App., *infra*, 31a.) The total cost for all of the 10th Street improvements that the City ultimately demanded from WLCP amounted to $726,225.48. (App., *infra*, 31a.) Because the City conditioned both development projects on the completion of the 10th Street improvements, WLCP and Show Timber again split the cost for those improvements independently of any direction from the City, with each party paying $363,112.74. (App., *infra*, 31a-32a.)

The City also required WLCP to petition to vacate Greene Street and to construct a gravel path along it as a condition to its development project. (App., *infra*, 32a.) That project cost WLCP $14,319. (App., *infra*, 32a.) The gravel pathway was not an improvement needed for the office park because the City does not require commercial developments to contribute to its parks system. In addition, the City also required WLCP to construct waterlines along 13th and Greene Streets, to make street improvements on Blankenship Road, and to make street, sewer, and storm improvements along 13th Street.

(App., *infra*, 32a.) Together, those projects cost WLCP $264,970. (App., *infra*, 32a.) As with the other required improvements, the City offered no evidence at trial showing that it attempted to determine the proportional impact of WLCP's project (as compared to the impact of Show Timber's residential Summerlinn Apartments project) to justify the imposition of those conditions.

Finally, on top of demanding the completion of those physical on-site and off-site improvements, the City also required WLCP to make cash payments of $182,544 as part of its System Development Charges ("SDC charges"). (App., *infra*, 32a-33a.) The City's SDC charges are charges that the City imposes to recover 100 percent of the cost of impacts by property development. (App., *infra*, 32a.) The City acknowledged that it had required WLCP to pay more in cash and improvement projects than the City assigned to WLCP in SDC charges, but the City refused WLCP's request for cash reimbursement of its overpayments. (App., *infra*, 32a-33a.) Instead, the City paid WLCP in SDC certificates with a face value of only $384,450. (App., *infra*, 32a-33a.) The SDC certificates may not be exchanged for cash, and may only be used to provide 50 percent of any system development credits for any project. Although SDC certificates may be sold to other developers, they have very little market value. (App., *infra*, 33a.) WLCP ultimately sold its unused SDC certificates at a 75 percent discount for a total of only $12,521. (App., *infra*, 33a.)

**Project Completion.** Because of the City's demand for numerous public improvement projects beyond the ones initially contemplated by the parties' agreement, the projected deadline for the project completion was reached without WLCP having

finished all of the off-site improvements that the City demanded. (App., *infra*, 33a.) WLCP had tenants preparing to move into the new office space and asked the City to issue occupancy permits, but the City refused. (App., *infra*, 33a.) The parties ultimately reached an agreement that the City would issue WLCP temporary occupancy permits for part of its building if WLCP signed a limited release of claims relating to the 10th Street improvements. (App., *infra*, 33a.) The release expressly provided that "nothing in [the] release prevents [WLCP] from filing any other type of action [unrelated to the 10th Street improvements] or claim related to SDCs for claims unrelated to the 10th Street corridor." (Ninth Circuit Excerpt of Record 124.) The release provided that the Oregon Department of Transportation ("ODOT") would be the agency responsible for determining whether WLCP had performed the 10th Street improvements adequately, and that the release was void if the City materially breached that agreement. Subsequently, in WLCP's view, the City breached its agreement with WLCP by demanding additional improvements to the 10th Street corridor and refusing to release WLCP's bond securing that project, even after ODOT approved of WLCP's performance of the 10th Street improvements and authorized the release of its bond. (App., *infra*, 33a.)

### B. Proceedings Below

**State Court and Federal District Court Proceedings.** In November 2001, WLCP initiated this case against the City in the Clackamas County Circuit Court for the State of Oregon. (App., *infra*, 34a.) The City removed the case to the United States District Court for the District of Oregon, which possessed federal question jurisdiction under 28 U.S.C.

§ 1331. (App., *infra*, 34a.) In its amended federal complaint – as in its state court complaint – WLCP asserted that the City had effected uncompensated takings in violation of the Oregon Constitution and the Fifth Amendment to the United States Constitution by requiring WLCP to construct and dedicate the off-site public improvement projects as a condition for approval of WLCP's development permit. (App., *infra*, 34a.) WLCP also asserted various other claims, including additional state and federal takings claims, an unjust enrichment claim, and a claim for unconstitutional retaliation under the First Amendment to the United States Constitution. (App., *infra*, 34a.) For its part, the City responded by filing various counterclaims for declaratory and injunctive relief against WLCP. (App., *infra*, 34a-35a.)

The parties subsequently filed competing motions for summary judgment. (App., *infra*, 35a.) The district court granted summary judgment to the City on two of WLCP's claims, and WLCP's remaining claims and the City's counterclaims then were set for a bench trial. The bench trial started on August 30, 2004 and lasted nine days. (App., *infra*, 35a.)

**District Court Decision.** On July 15, 2005, the district court issued oral rulings on its decisions from the trial. (App., *infra*, 1a-14a.) As to the City's counterclaims against WLCP, the district court denied all relief. (App., *infra*, 10a.) As to WLCP's claims against the City, the district court granted relief on WLCP's claims that the City had effected an uncompensated taking of WLCP's property interests in the intersection at Greene and 13th Streets in violation of the Oregon Constitution and the Fifth Amendment. (App., *infra*, 7a-8a.) The district court also granted

relief on WLCP's First Amendment retaliation claim. (App., *infra*, 9a.) As to WLCP's state and federal takings claims for the City's imposition of the numerous off-site public improvement projects as a condition for approval of WLCP's development permit, however, the district court denied relief to WLCP based on its conclusion that the claims were unripe because WLCP had not availed itself of local remedies. (App., *infra*, 4a-5a.) The district court also concluded that WLCP's claims were waived to the extent that they were related to the 10th Street improvement projects because of the limited release that WLCP entered with the City to obtain its temporary occupancy permits. (App., *infra*, 4a.) Finally, the district court denied WLCP's claim for unjust enrichment. (App., *infra*, 6a.)

**Initial Ninth Circuit Decision.** After unsuccessfully moving for reconsideration, WLCP timely appealed to the Ninth Circuit, challenging the district court's denial of WLCP's state and federal takings claims relating to the off-site public improvement projects. For its part, the City filed a cross-appeal to the Ninth Circuit, challenging the district court's rulings in favor of WLCP and the denial of its counterclaims.

After briefing and oral argument on the appeals, the Ninth Circuit concluded that WLCP's takings claims depended on the answers to some unsettled issues of Oregon land-use law. (App., *infra*, 24a.) Based on that conclusion, the Ninth Circuit issued a written opinion certifying three questions to the Oregon Supreme Court under Or. Rev. Stat. § 28.200 *et seq*. (App., *infra*, 22a-51a.) The two certified questions relevant to this appeal were:

> Must a landowner alleging that a condition of development amounts to an exaction or physical taking exhaust available local remedies before bringing his [or her] claim of inverse condemnation in an Oregon state court?
>
> Can a condition of development that requires a landowner to improve off-site public property in which the landowner has no property interest constitute an exaction?

(App., *infra*, 50a.) In certifying those questions, the Ninth Circuit opined that the answers to those questions "largely dictate the justiciability of this matter" and that it required further guidance on Oregon law. (App., *infra*, 36a.)

**Oregon Supreme Court Decision.** The Oregon Supreme Court accepted the Ninth Circuit's certification. (App., *infra*, 52a-117a.) After slightly rephrasing the first certified question to add the assumption that the required off-site improvements were not "roughly proportional" to the impact of the development,[1] the Oregon Supreme Court instructed that a landowner must pursue local administrative remedies of valid claims, but need not appeal decisions of the local government to the Oregon Land Use Board

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[1] The Oregon Supreme Court rephrased the Ninth Circuit's first question to state:

> Whether a plaintiff bringing an inverse condemnation action alleging that a city imposed, as a condition of development, a requirement that plaintiff construct off-site improvements at a cost not "roughly proportional" to the impacts of the development is required to pursue administrative remedies before filing that claim in state court?

(App., *infra*, 67a.)

of Appeals ("LUBA"). (App., *infra*, 73a-75a.) Specifically, the Oregon Supreme Court held:

> Accordingly, we answer the Ninth Circuit's first question as follows: Assuming that Oregon law permits an inverse condemnation action premised on allegations that a condition of development requires a landowner to construct off-site improvements at a cost not roughly proportional to the impacts of development, Oregon law requires the landowner to pursue available local administrative remedies, but not to appeal to LUBA, as a prerequisite to bringing that action in state court.

(App., *infra*, 74a-75a.)

In so answering the Ninth Circuit's first question, the Oregon Supreme Court expressly conditioned its answer on the assumption that WLCP had viable state takings claims against the City that WLCP did not pursue before local administrative bodies. (App., *infra*, 64a.) In stressing the importance of that assumption, the Oregon Supreme Court explained that the viability of the claims mattered because the state-law exhaustion requirement applied only to valid state-law claims. Specifically, the Oregon Supreme Court explained:

> The district court's ruling that plaintiff was required to pursue local remedies before filing its claims for inverse condemnation presumed the viability of those claims. *If state law does not recognize those claims, then plaintiff's failure to take administrative steps preliminary to their assertion cannot serve as a basis for entry of judgment against plaintiff.*

(App., *infra*, 64a (emphasis added).) The Oregon Supreme Court thus made clear that any failure by WLCP to exhaust local administrative remedies was irrelevant if WLCP did not have a state takings claim for the public improvements that the City required WLCP to construct. (App., *infra*, 64a.)

After answering that procedural question, the Oregon Supreme Court then turned to the Ninth Circuit's second question and concluded that WLCP in fact did not have a viable state takings claim based on the City's imposition of the numerous off-site public improvement projects as a condition for approval of WLCP's development permit. (App., *infra*, 75a-100a.) Specifically, after slightly rephrasing the Ninth Circuit's second certified question,[2] the Oregon Supreme Court answered the question as follows:

> No, a property owner that alleges that a city has required it to construct off-site improvements at a cost that is not "roughly proportional" to the impact of the development, as opposed to dedicating an interest in real property such as granting an easement, does not allege a taking that gives rise to a claim for just compensation.

(App., *infra*, 100a.) Notably, in answering this question, the majority of the Oregon Supreme Court purported to go beyond merely interpreting Oregon law, concluding that it was somehow required to address whether WLCP possessed a viable claim for just compensation under the Fifth Amendment to the United States Constitution. (App., *infra*, 76a.)

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[2] The Oregon Supreme Court again narrowed the second question certified by the Ninth Circuit in order to more specifically address the type of "exaction" alleged here, but did not fundamentally alter the question's import. (App., *infra*, 67a.)

Relying largely on this Court's decision in *Lingle v. Chevron USA Inc*., 544 U.S. 528 (2005), the majority concluded that this Court had somehow limited its prior holdings in *Nollan* and *Dolan* and that the Takings Clause of the Fifth Amendment provided no remedy for the compelled dedication of off-site improvements complained of by WLCP. (App., *infra*, 76a-91a.) Two judges dissented from the opinion on that ground and pointed out that the Ninth Circuit had sought only an opinion from the Oregon Supreme Court on issues of state law. (App., *infra*, 110a-117a.)

**Second Ninth Circuit Decision.** After the Oregon Supreme Court filed its answers to the Ninth Circuit's certified questions, the Ninth Circuit issued a second opinion on the merits on the claims on appeal. (App., *infra*, 118a-125a.) On WLCP's federal takings claim for the City's condition of the off-site improvements, the Ninth Circuit first expressly recognized that the viability of WLCP's claim was a question of federal law – not Oregon state law – and that it had a duty to make an independent determination of the claim. (App., *infra*, 120a.) The Ninth Circuit then determined that it did not need to determine whether WLCP's federal takings claim was ripe because that claim was not cognizable under the Takings Clause of the Fifth Amendment in any event. (App., *infra*, 121a.) In reaching that conclusion, the Ninth Circuit opined, citing *Lingle*, that this Court "has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property." (App., *infra*, 121a.) Because the City's required off-site public improvements did not involve the transfer of real property, the Ninth Circuit concluded that *Nollan*'s "essential nexus" and *Dolan*'s "rough proportionality" requirements did not apply and that WLCP failed to "allege

a cognizable federal Fifth Amendment taking." (App., *infra*, 121a.)

## REASONS FOR GRANTING THE PETITION

Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Nothing is inherently bad about exactions. Indeed, exactions have the potential to benefit all by providing government "with a means of escaping the narrow choice between denying a plaintiff his [or her] project permit altogether or subordinating legitimate public interests to the plaintiff's development plans." *Ehrlich v. City of Culver City*, 911 P.2d 429, 449 (Cal. 1996). On the other hand, courts and commentators generally agree that government's ability to impose exactions as a condition of development approval must be kept within limits to avoid the "inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation." *Id*. at 439 (emphasis in original); *see also* Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 Stan. Envtl. L. J. 577, 581 (2009) (noting consensus by most, if not all, scholars that "government's ability to impose exactions should be bounded"). The question presented by this case is the type of exactions that trigger the protections of the Takings Clause under the Fifth Amendment and the requirements of this Court's decisions in *Nollan* and *Dolan*.

### A. This Court Has Not Defined the Exactions That Trigger the Protections of the Fifth Amendment and the Requirements of *Nollan* and *Dolan*

In an effort to set limits on government's ability to impose exactions as a condition of development approval, this Court in *Nollan* and *Dolan* established standards for determining the constitutionality of such property exactions. Taken together, the *Nollan* and *Dolan* decisions stand for the rule that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when private property is taken for a public use—in exchange for a discretionary benefit conferred by the government" unless there is an essential nexus between the condition and a legitimate state interest and unless the condition is roughly proportional to the impact of the proposed development. *Dolan*, 512 U.S. at 391; *see also Nollan*, 483 U.S. at 837.

In *Nollan*, the property owners' application for a development permit was granted on the condition that they allow the public an easement to cross their oceanfront property. *Id*. at 828. In considering whether that condition constituted an unconstitutional taking, this Court observed that, if the government had simply required the property owner to convey an easement "in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id*. at 831. After making that observation, the Court then considered "whether requiring [the easement] to be conveyed as a condition for issuing a land-use permit alters the outcome." *Id*. at 834. The

Court concluded that such a requirement also constituted a taking because, under the circumstances presented, there was a "lack of nexus between the condition" and any governmental interest that would have permitted the government to deny the proposed development. *Id*. at 837. In so concluding, the Court explained that the imposed condition was "not a valid regulation of land use but 'an out-and-out plan of extortion'," pointing out that the Takings Clause of the Fifth Amendment prohibited governmental entities from "leveraging of the police power" to obtain private property for public use "without payment of compensation." *Id*. at 837 and n.5 (citations omitted).

Following *Nollan*, this Court further clarified the standards for evaluating the constitutionality of exactions for discretionary development permits in its decision in *Dolan*. In *Dolan*, the property owner sought a permit application to redevelop her property. *Dolan*, 512 U.S. at 379. The city imposed several conditions on a grant of the application including the dedication of sufficient open land for a greenway, as well as a pedestrian and bicycle path. *Id*. at 379-80. In evaluating the constitutionality of these conditions under the Fifth Amendment, the Court first noted that the conditions imposed on the property owner were not "legislative determinations classifying entire areas of the city" or "limitations on the use petitioner might make of her own parcel," but were rather imposed as part of "an adjudicative decision" requiring that "she deed portions of the property to the city." *Id*. at 385. Unlike *Nollan*, the Court concluded that there was an essential nexus between the conditions imposed by the city and its legitimate governmental interests. *Id*. at 387-88. Notwithstanding that essential nexus, however, the Court determined that the conditions lacked a sufficient

relationship to the impact of the proposed development. Without such a relationship, the Court observed that such conditions could "merely be used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Id.* at 390 (citations omitted). Therefore, to pass constitutional muster, the Court held that exactions must be roughly proportional to the projected impact of the development, explaining:

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city 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.* at 391.

The property exactions at issue in *Nollan* and *Dolan* were exactions involving the dedication of private real property for public use. The question presented squarely in this case is whether the constitutional protections of *Nollan* and *Dolan* are reserved for only those circumstances where the government exacts some identifiable interest in real property as a condition for approval of a discretionary development permit, or whether those protections apply more broadly to cover circumstances where the government as part of an adjudicative process conditions approval of a discretionary development permit on the requirement that a property owner construct and deliver tangible physical improvements to public land or on the payment of money for the same purposes. A wide, irreconcilable, and deepening split has devel-

oped among state courts and lower federal courts regarding this important constitutional question. Because only this Court can resolve the conflict among the courts and provide guidance on the types of property exactions subject to the *Nollan* and *Dolan* requirements, this Court should grant this petition for a writ of certiorari.

### B. The Ninth Circuit's Decision is in Direct Conflict with Decisions of Other Courts

In sharp contrast to decisions of other courts, the Ninth Circuit in this case adopted a narrow view of the types of property exactions that may constitute compensable takings under the Fifth Amendment, significantly limiting the reach of this Court's decisions in *Nollan* and *Dolan*. According to the Ninth Circuit, the "essential nexus" and "rough proportionality" requirements for property exactions under *Nollan* and *Dolan* apply only in "situations in which the government requires a dedication of private real property." (App., *infra*, 121a.) Based on that view, the Ninth Circuit concluded that petitioner WLCP failed to allege a cognizable takings claim under the Fifth Amendment because the property exactions at issue in this case did not involve the dedication of real property. Accepting that WLCP was required "to construct several off-site public improvements with its personal property (money, piping, sand and gravel etc.)" as a condition for the City's discretionary approval of WLCP's development permit, the Ninth Circuit concluded that the imposition of such a condition did not trigger the protection of the Fifth Amendment even if the condition was not roughly proportional to the impact of WLCP's proposed development. (App., *infra*, 121a.)

The Ninth Circuit's conclusion directly conflicts with decisions of other courts, including the California and Texas Supreme Courts. *See* Sup. Ct. R. 10(a) (compelling reason exists for the grant of a petition for writ of certiorari where a United States court of appeals "has decided an important federal question in a way that conflicts with a decision of a state court of last resort"). On remand from this Court requiring a reexamination of the case under the then-newly-decided *Dolan* decision, the Supreme Court of California held in *Ehrlich*, 911 P.2d 429, that the principles of *Nollan* and *Dolan* "apply to development permits that exact a *fee* as a condition of issuance, rather than, as in both *Nollan* and *Dolan*, the *possessory* dedication of real property." (Emphasis in original.)

In *Ehrlich*, the city imposed a monetary exaction of $280,000 by requiring the landowner to build public recreational facilities as a condition of development. In imposing that requirement, the city contended that *Dolan*'s "heightened takings clause standard" applies "*only* to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval." *Id*. at 432 (emphasis in original). The California Supreme Court unanimously disagreed and held that *Dolan* was not so limited. *See San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction was subject to *Nollan*/*Dolan* scrutiny.") The *Ehrlich* court stated that "it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." *Ehrlich*, 911 P.2d at 444 (em-

phasis in original). Based on that view, the court held "[w]hen such exactions are imposed—as in this case—neither generally or ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." *Id*. The court's conclusion was based on its view that "[o]ne of the central promises of the takings clause is that truly public burdens will be publicly borne" and that "the risk of too elastic or diluted a takings standard—the vice of distributive injustice in the allocation of civic costs—is heightened in either case." *Id*.

In *Flower Mound, Texas v. Stafford Estate Ltd. Partnerships*, 135 S.W.3d 620 (Tex. 2004), the Texas Supreme Court followed *Ehrlich* and took the same view. In *Flower Mound*, the Texas Supreme Court held that the city's requirement that the landowner rebuild an abutting road as a condition of development was subject to *Dolan*. In doing so, the court explained that "[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved." *Id*. at 639-40. The court specifically rejected the assertion that *Dolan* was limited to forced dedications of real property. *Id*. at 636.

Other state courts have followed the lead of the *Ehrlich* and *Flower Mound* decisions and similarly have applied the requirements of *Nollan* and *Dolan* to exactions not involving the dedication of real property. *See, e.g.*, *St. Johns River Water Mgt. Dist. v. Koontz*, 5 So. 3d 8, 12-13 (Fla. Dist. Ct. App. 2009) (requirement that property owner improve public

property was covered by *Dolan*); *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 13 n.2 (N.J. 2008) (New Jersey's application of a strict nexus test between the required off-site improvements and the impact of the development is consistent with the *Dolan* test); *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944, 95-51 (Wash. Ct. App. 2000) (*Dolan*'s rough proportionality test applies to requirement imposed on landowner to improve an adjoining street), *aff'd*, 49 P.3d 860 (2002) (affirmed on sub-constitutional grounds); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (*Dolan* applied to impact fees); *Northern Illinois Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 388-89 (Ill. 1995) (citing *Dolan*, court applies a heightened nexus standard to county's traffic impact fees).

Arrayed against these cases and their holdings that *Nollan* and *Dolan* are not limited to exactions of interests in real property are the Ninth Circuit's holding below and the Oregon Supreme Court's decision on certification in this case.[3] In its decision, the

[3] While other courts have declined to apply *Dolan* to exactions which do not involve the dedication of real property, these cases have involved legislatively-enacted impact fees and have depended on the distinction between a broadly applicable legislative enactment and an *ad hoc* adjudicatory determination such as the one made by the City with regards to WLCP's property in this case. *See, e.g.*, *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001) (while holding that a legislatively created sanitation fee was not subject to *Dolan*, the Colorado Supreme Court recognized that application of the *Dolan* test might still be appropriate in "cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions development on the exaction of private property for public use"); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (when exaction is

Oregon Supreme Court likened the construction and delivery of off-site improvements to the payment of money and stated:

> In the absence of a Supreme Court ruling to the contrary, we conclude that a government's requirement that a property owner undertake a monetary obligation that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan*/*Dolan* or a taking under the Fifth Amendment, nor does it require payment of just compensation.

(App., *infra*, 89a.) For its part, the Ninth Circuit also expressly relied on the absence of any clear holding from this Court that the *Nollan* and *Dolan* requirements had any application outside of the compelled dedication of an interest in real property, stating that "the Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires dedication of private real property." (App., *infra*, 121a.)

Each court's reliance on the lack of any firm support from this Court for extending *Nollan* and *Dolan* beyond exactions of real property underscores the need for a definitive resolution of this issue, an issue which is presented squarely by this case. Petitioner

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imposed pursuant to a "generally applicable legislative decision" as opposed to an adjudicative decision, risk of improper "leveraging" of landowner is not present and hence *Dolan* does not apply); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (because development impact tax was imposed "by legislative enactment, not by adjudication," it was not subject to *Dolan*'s requirements).

WLCP has contended throughout this litigation that, consistent with the California and Texas Supreme Courts, "the city's requirement that it use 'asphalt, concrete, bedding material, pipe and other personal property' to construct public improvements cannot be distinguished from the requirements imposed by the governments and considered by the courts in *Nollan* and *Dolan*." (App., *infra*, 83a.) As the California and Texas Supreme Courts have concluded, any coerced transfer of property, whether real or personal, must meet the *Nollan* and *Dolan* standard. Indeed, even if the construction and delivery of off-site improvements may appropriately be considered the mere payment of money, the *Nollan* and *Dolan* analysis applies when the government uses its regulatory power in an adjudicative proceeding to coerce such payment. *See, e.g.*, *Brown v. Legal Foundation*, 538 U.S. 216, 234 (2003) (money is "private property" for purposes of the Fifth Amendment's proscription against governmental taking of private property without just compensation); *Phillips v. Washington Legal Foundatio*n, 524 U.S. 156, 172 (1998) (interest generated on IOLTA account is "private property" of the owner of the principal for "takings" purposes). For its part, the City has argued the opposite, asserting that *Nollan* and *Dolan* have no application unless the government requires the dedication of an interest in real property. (App., *infra*, 84a.)

Given these opposing views, the meaning and purpose of a major element of this Court's takings jurisprudence under the Fifth Amendment is directly at issue in this case. Given the important and significant national ramifications in the areas of land use regulation and property rights, review is warranted. *See, e.g.*, Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan*

*and Dolan*, 15 N. Ill. U. L. Rev. 513, 516 (1995) ("[f]aced with shrinking budgets," local governments have "increasingly relied on development exactions as a funding source" to offset the perceived costs of development).

### C. The Conflict Among State Courts and Lower Federal Courts Has Been Engendered by Confusion About This Court's Decision in *Lingle*

In concluding that *Nolan* and *Dolan* applied to only compelled dedication of interests in real property, both the Ninth Circuit and the Oregon Supreme Court relied heavily on this Court's decision in *Lingle*. (App., *infra*, 76a-81a, 121a.) In doing so, however, neither court offered a cogent explanation of how or why *Lingle* limits the application of the rough proportionality test of *Nollan*/*Dolan*. In fact, nothing in *Lingle* supports the notion that *Nollan* and *Dolan* are somehow inapplicable simply because the government, as part of an adjudicative process, demands only personal property or money as a condition of development approval rather than an interest in real property.

The fundamental federal constitutional issue in this case is whether government can, through an individualized *ad hoc* determination, compel a property owner to construct and deliver to it tangible physical improvements for public benefit without demonstrating that the requirements are "roughly proportional" to the impact of the property owner's development. *Lingle* did not involve such a claim. Rather, *Lingle* involved an attempt under the Takings Clause of the Fifth Amendment to strike down a state statute imposing a cap on the rents chargeable by an oil company to its lessees on the grounds that the cap

did not substantially advance the state's asserted interest in enacting the law. *Lingle*, 544 U.S. at 532.

In reaching the conclusion that a takings claim cannot be supported solely upon such grounds, this Court summarized its takings jurisprudence but was careful not to limit *Nollan* and *Dolan* in any way. Thus, after first summarizing the "paradigmatic taking" involving "a direct government appropriation or physical invasion of private property," this Court discussed three situations where government regulations could constitute a taking under the Fifth Amendment: (1) where a regulation "requires an owner to suffer a permanent physical invasion of her property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) where a regulation completely denies an owner all "economically beneficial use of her property," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (internal quotation marks omitted); and (3) where a regulation imposes economic impacts under the factors identified in *Penn Central Transp. Co. v. New York City*, 438 U.S. 103, 124 (1978), the most important of which is interference with "distinct investment-backed expectations." *Lingle*, 544 U.S. at 537-39 (internal quotation marks omitted). Following this summary, this Court held that the "substantially advances" formula previously recognized in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), was not "a valid takings test," unlike the "three regulatory takings tests discussed above." *Lingle*, 544 U.S. at 542, 545.

After this holding, the Court in *Lingle* discussed *Nollan* and *Dolan* in *dictum* not to question the validity of those cases or to limit their reach, but to make clear that the Court's decision "should not be read to disturb these precedents." *Id.* at 548.

Emphasizing as it had previously done in *Dolan* that "these cases involve a special application of the 'doctrine of unconstitutional conditions,'" this Court described *Nollan* and *Dolan* as involving "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Id*. at 547.

This Court's use of the word "property," and not the words "real property," is telling. Nothing in the Court's decision implies that the doctrine of unconstitutional exactions as applied in *Nollan* and *Dolan* is inapplicable where the government makes an adjudicative decision to require as a condition of development approval a non-proportional transfer of personal property or money as opposed to an interest in real property. In fact, it is highly unlikely that application of the doctrine of unconstitutional conditions depends on the character of the property acquired by the government since the doctrine's origin is traceable to cases which did not involve the relinquishment of property rights. *See Dolan*, 544 U.S. at 385 (in applying the "well-settled doctrine of 'unconstitutional conditions," the Court cited *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), cases in which the involved discretionary governmental benefit, the right to continued public employment, was conditioned upon the relinquishment of free speech rights, not property rights).[4]

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[4] In fact, to argue that the government may condition a discretionary benefit on the relinquishment of the right to be free from an uncompensated taking of personal property unfairly derogates the Takings Clause. *See Dolan*, 512 U.S. at 392 (this Court found "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First

Despite the lack of limiting language in *Lingle* and the fact that the doctrine of unconstitutional conditions is not property-based, there has been considerable speculation among legal commentators that the *dictum* in *Lingle* somehow limits "takings" claims under *Nollan* and *Dolan*. *See, e.g.*, Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 Environs Envtl. L & Pol'y J. 189, 212-14 (2010) (describing discussion of *Nollan* and *Dolan* in *Lingle* as "insightful dicta" that "could be read" as limiting the application of these cases to all but a "narrow set of exactions involving public, physical invasions"); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 Stan. Envtl. L. J. 577, 580 (2009) (positing theory that *Nollan* and *Dolan* "can only apply to permit conditions that dedicate real property to the public"). In contrast, other commentators argue that *Nollan* and *Dolan* must be given an expansive reading "based on whether the actual 'exaction' in question would constitute a taking outside the development context." *See, e.g.*, Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1576 (2006); *see also* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Calif. L. Rev. 609, 637 (2004) (suggesting that this Court's remand of *Ehrlich* "may have settled the issue in favor of extending *Nolan* and *Dolan* to nonpossessory exactions"). This conflict among academics further highlights the need for this Court to determine the proper scope and reach of *Nollan* and *Dolan*.

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Amendment or the Fourth Amendment, should be relegated to the status of a poor relation").

## CONCLUSION

This case directly poses the question whether, as a matter of federal constitutional law, the doctrine of "unconstitutional conditions" as recognized in *Nollan*/*Dolan* and reemphasized in *Lingle*, prevents the City from demanding that WLCP provide property for the public good, whether real property, personal property, or even money, in exchange for the discretionary approval of WLCP's development application where the conditions demanded are not roughly proportional to the impacts of its proposed development. The Supreme Courts of California and Texas answer this question affirmatively, finding no good reason why exactions which require the dedication of real property interests should be treated any differently than exactions which require the construction and delivery of personal property or even exactions which only require the payment of money. Taking the exact opposite view, the Supreme Court of Oregon and the Ninth Circuit Court of Appeals perceive an important distinction between the compelled dedications of interests in real property as opposed to compelled dedications of personal property.

Petitioner contends that this distinction makes little sense. Just as the government could not, in the absence of a development application, compel a property owner to surrender an easement across his or her private property for a public purpose without the payment of just compensation, the government may not compel a property owner to surrender for a public purpose his or her automobile, the contents of his or her bank account, or even intangible property rights without payment of just compensation. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003

(1984) ("property" protected by the Takings Clause of the Fifth Amendment protects land, personal property such as tangible goods and even intangible property such as trade secrets). To the extent that such demands are made by the government pursuant to an *ad hoc* individualized determination regarding an application to develop real property, the result must be the same regardless of whether the exaction requires a transfer of real property – as in *Nollan* and *Dolan* – or a transfer of personal property – as in this case. This Court should grant the petition for writ of certiorari to address this important constitutional issue.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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No. CV-01-1787-AS

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WEST LINN CORPORATE PARK, LLC,
*Plaintiff*,

vs.

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

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July 15, 2005
Portland, Oregon

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TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE DONALD C. ASHMANSKAS
UNITED STATES DISTRICT COURT
MAGISTRATE

[2] APPEARANCES

FOR THE PLAINTIFF:

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[3] (PROCEEDINGS)

THE COURT: Good afternoon, all. For the record, I'll identify those who are present in this matter, which is a rendering of the final decision in the matter of West Linn Development Corporation—West Linn Corporate Park, LLC, is probably more accurate, versus the City of West Linn, Boris Piatski and Doe defendants one through 10. The file number is CV-1-1787-AS.

And in the courtroom we have Mr. Joe Willis and Jill Gelineau, Tina Granados, representing the plaintiffs.

MR. WILLIS: Good afternoon, Your Honor.

MS. GELINEAU: Good afternoon, Judge.

THE COURT: Then we have—and also their client, Mr. Kelley, is present.

And then we have Mr. Robert Franz and the City Attorney's Office, Mr. Stephen Crew.

Mr. Crew, are you the actual city attorney or is Mr. Ramis?

MR. CREW: Mr. Ramis is the actual city attorney.

THE COURT: And I believe, if I'm not mistaken, we have Mr. Piatski in the courtroom as well.

I'll not go into further apologies. I must confess I'm embarrassed by having to do this, but if I don't do it this way, it's going to exceed a civil period of time for reasons that I have no control over.

[4] What I've done is, I've had the luxury, if nothing else, of reviewing all my notes. I've gone through the legal memorandums that have been filed, the summary judgments and so forth, the two that were

issued. I've gone through the proposed findings of both sides. I've also looked at a variety of cases that have been cited for a variety of issues. No one will be happy, probably, with the final result.

So let me start now. First of all, I'll deal with the release.

As a preliminary matter, the release executed between the parties I find to be valid. It applies to all claims in existence at the time it was executed, as reflected in the draft complaint that accompanied it, as relevant to condition No. 5, which required improvements on the 10th Street—or to the 10th Street corridor. I agree defendant is entitled to judgment on the following claims as they apply to the 10th Street corridor improvements: the federal and state takings claims and the unjust enrichment claim.

With respect to the first claim for relief, the inverse condemnation under Article 1, Section 18 of the Oregon Constitution, plaintiff contends that off-site improvements, that the off-site improvements it was required to construct as conditions of approval for the West Linn [5] Corporate Park were not roughly proportional to the impact of plaintiff's development and consequently constituted a taking of plaintiff's property without just compensation.

I find first that Renaissance Development Corporation applied for and obtained development approval of what became the West Linn Corporate Park. The approval contained conditions of approval that required Renaissance to construct various off-site improvements.

Two, I find that Renaissance could have appealed the conditions of approval to the land use hearings officer of the City of West Linn, and after that

Renaissance could have appealed to the West Linn City Council and then to the Land Use Board of Appeals, also known as LUBA. Renaissance did not appeal the conditions of approval. After purchasing the property, plaintiff did file a request for an amendment to condition No. 5, seeking to allow occupancy prior to the completion of the 10th Street improvements, but that request was withdrawn before any decision was made by the City.

Plaintiff completed the development in compliance with the conditions imposed by the City and leased space in the buildings before initiating the present lawsuit.

I conclude with respect to the legal issues that plaintiff's failure to appeal the conditions of approval, seek a variance or otherwise utilize available administrative remedies bars its claims for inverse [6] condemnation under the Oregon Constitution. The Oregon Supreme Court has stated that "if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken," citing *Suess Builders*—I'm citing *Suess Builders v. City of Beaverton*, 294 Or. 254.

Therefore, because the plaintiff failed to pursue available administrative remedies, its claim is not yet ripe, and defendant is entitled to judgment in its favor on plaintiff's state law takings claim.

With respect to the second claim for relief, which is the inverse condemnation under the United States Constitution, based on the same factual allegations as the first claim, plaintiff also seeks compensation for a taking under the federal constitution.

The findings of fact under the first claim for relief are incorporated as relevant to the second claim for relief.

My conclusions of law are plaintiff's federal taking claim is not ripe under the second prong of *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, which requires the plaintiff to seek just compensation from the state before bringing a federal action.

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 [7] 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.

On the third claim for relief, the unjust enrichment, plaintiff's third claim alleges that the City was unjustly enriched by the construction of the public improvements and by the issuance of system development credits that are worth less than their face value.

The findings of fact that I've made with respect to the first and second claims are incorporated as relevant to this third claim.

In conclusion, I find that plaintiff must have previously exhausted its legal remedies to maintain a claim for unjust enrichment. I cite *L.S. Henricksen Construction v. Shea*, 155 Or. App. 156, and *Tum-A-Lum Lumber v. Patrick*, 95 Or. App. 719.

Equitable jurisdiction is not proper if there is an adequate remedy at law, and I cite *Johnson v. Steen*, 281 Or. 361.

Finally, plaintiff has failed to exhaust the legal remedies for compensation for the public improvements it was required to make, as set forth in the conditions of approval. Consequently, it cannot maintain a claim for unjust enrichment and defendant is entitled to judgment in its favor on the equitable claim.

[8] On the fourth and fifth claims for relief, the inverse condemnation resulting from the vacation of Greene Street, I find as a condition of development, the City required both the plaintiff and neighboring property owner, Show Timber, to vacate a portion of Greene Street.

A legal of description of the area to be vacated prepared by City engineers—no, prepared by engineers employed by Show Timber excepted the intersection of Greene and 13th Streets to allow access through on 13th Street. This area, the disputed intersection, is 30 by 20 feet in area.

The City planner would not accept the description as prepared and indicated over the engineers' objections that the intersection of Greene and 13th Streets would also need to be vacated. Thus, in contrast to the other conditions of approval, plaintiff did object to the requirement that an additional legal description be prepared to include the disputed intersection.

The engineers prepared a revised legal description including the disputed intersection, and the vacation was authorized or effected by City Ordinance No. 1439.

The City realized it had erred in vacating the disputed intersection and asked plaintiff to convey the property to the City, which plaintiff refused to do so.

City Ordinance No. 1439 reserved a utility [9] easement across the disputed intersection. Relying on that easement and the pedestrian pathway easement along Greene Street, the City filed an easement purporting to allow vehicular access across the disputed intersection.

The fair market value of the disputed intersection is $8.50 per square foot, or $5,100.

I conclude that City Ordinance No. 1439 had the legal effect of vacating all of Greene Street, including the disputed intersection, which consequently vested in plaintiff as the successor in interest to the owner that had originally dedicated the property.

Second, the vehicular access easement filed by the City exceeds the scope of the utility easement reserved by Ordinance No. 1439, as well as the pedestrian pathway easement on Greene Street, and is therefore invalid.

The City's actions constitute a taking of the disputed intersection and plaintiff is entitled to its fair market value of $5,100.

The sixth claim for relief, the so-called retaliation claim, this alleges that plaintiff engaged in protected speech by complaining about being required to build public improvements and refusing to dedicate the disputed intersection to the City. Plaintiff alleges that the City and Boris Piatski retaliated against the plaintiff for this speech in a number of ways.

[10] I find with respect to the factual issues that Francis Carter's testimony is more credible than—I find Francis Carter's testimony credible that Boris Piatski indicated he would not release performance

bonds until plaintiff dedicated to the City the disputed intersection at 13th and Greene Street.

Plaintiff constructed the 10th Street corridor improvements as specified in a report of the City's engineer, Kittleson and Associates, and the Oregon Department of Transportation approved the 10th Street corridor improvements as constructed.

The City, through Boris Piatski, has failed to release the bond related to the 10th Street corridor improvements.

I conclude as a matter of law that the failure to release the performance bonds was motivated by Boris Piatski's intention to retaliate against the plaintiff for exercising its First Amendment rights in regard to its refusal to dedicate the disputed intersection to the City, and to reconstruct the 10th Street corridor improvements.

In so refusing to issue the performance bonds, Mr. Piatski violated plaintiff's civil rights as guaranteed under the First Amendment to the United States Constitution.

Plaintiff was caused to incur direct pecuniary costs in the amount of the bond premiums that it continued [11] to have to pay in the amount of $13,053.68.

The plaintiff is entitled to relief against the defendant Piatski on its claim in the amount of $13,053.68. In addition, defendant is ordered to release the performance bond.

I further find that the City itself is liable on the retaliation because Mr. Piatski had final authority on the day-to-day supervision of the plaintiff's development of the West Linn Park. Although I'm familiar with the case law under Mannell (ph), I find in this

case that the plaintiff has demonstrated a deliberate choice and followed a course of action made from among various alternatives by the official responsible for establishing final policy—in this case Mr. Piatski—with respect to the subject matter in question, and therefore I find the City liable on the sixth claim for relief with respect to the retaliation.

On the seventh claim for retaliations, I find that the plaintiff has not carried its burden of proof on that, and the City is entitled to prevail on the seventh.

With respect to the counterclaims, the defendant's first counterclaim seeks an order requiring plaintiff to post a maintenance bond in the event the City is ordered to release the performance bond. Defendant's other five counterclaims relate to the vacation of the disputed intersection at Greene and 13th Street.

[12] The Court concludes that plaintiff is entitled to judgment in its favor on all six of defendant's counterclaims.

Those are my findings, those are my rulings.

I guess at this time the only question I would have on the dollar amount, I think there was stipulations that it was $5,000—on the street vacation issue, I think there was a stipulation that it was $5,100. On the premiums, my notes reflect $13,053.68, but I am not sure that didn't continue. So—

MS. GELINEAU: It is continuing, Your Honor.

THE COURT: So whatever amount it is at the present time would be the amount of that, rather than the $13,053. So whatever it is at the present time, the City is ordered to release the bond.

I'll entertain questions, not arguments and not judgments about my delay or my wisdom in these findings, but for clarification, I think perhaps I would ask Mr. Willis and Ms. Gelineau if they would prepare a judgment order reflecting my decision.

Now, I have not considered whether attorney fees are warranted or not, I have not looked at that issue, so that issue is something separate and apart from this.

MR. WILLIS: The only thing I would ask, Your Honor, is the bond payment amounts I think were discrete [13] amounts, and I think we requested that interest should be allowed on those amounts.

THE COURT: They are discrete amounts.

Mr. Franz, anything on that?

MR, FRANZ: Well, I don't want to quibble too much. I guess—I mean, I'd leave it up to you.

THE COURT: I will grant it in this context. As I say, it's not something that had to be found. There was, as Mr. Willis puts it, discrete amounts.

MR. WILLIS: I'm just trying to be efficient. The other thing is, is under the just compensation clause with adverse taking, there's also interest due on that from the date of taking until it's paid.

THE COURT: I will probably allow that. So when you prepare the judgment, you can reflect that.

If you feel strongly, Mr. Franz, that you can prove that the Court is in error, then I'll entertain objections. I had expected you to talk about it beforehand as far as the style and the form of the judgment and so forth, and if there's a real dispute I'll resolve it, but if there's not a dispute, if you have an objection,

you can put it on the record and I'll still take a look at it.

Mr. Franz?

MR. FRANZ: Do you want like you already ruled sometime back, and I can't remember if it was the eighth [14] cause of action, and that had an attorney fee provision.

THE COURT: There was the equal protection and there was—

MR. FRANZ: There was something else.

THE COURT:—an annexation policy, I think.

MR. FRANZ: Do you want us and Mr. Willis to file a petition for attorney fees and incorporate it in one big judgment or do you want to have the judgment entered on this, and then if we can't agree on fees, do petitions?

THE COURT: Why don't we after the judgment on this then deal with the attorney fees separately, just so we can get this out of the way before I retire.

MR. WILLIS: And then because of scheduling, Your Honor, too, if we—once we enter the judgment we may have some time lines to face on those positions on the filing of the petitions, and I would, like to—I would formally move the Court to extend that.

THE COURT: I'll extend whatever time is necessary. I know Mr. Willis has to go somewhere and I'm leaving town tomorrow. I'll give you whatever time is necessary for either side to accomplish what you think is necessary. As I say, I'll expect, as you have in the past, to deal with the raw materials of the judgment, and if you can sign off on it, fine, without waiving any rights to either appeal or object to it.

[15] I think I've covered everything. I think the counterclaims—I know we had the eighth and ninth claims. I can tell you right now. One was—the breach of the annexation agreement was the ninth claim, which I found for defendants on summary, judgment, and I think the eighth claim was the equal protection argument that I also found for defendants. So we might incorporate those in the final judgment just to have something tidy and in one document. Then, as I say, I'll deal with the prevailing attorney fees and costs.

As far as the interest running, I'll do it up until today, the interest as of today, because I don't want things rushed as far as getting documents in before the cutoff date and so forth. So that will be my ruling. You will get the bond premiums, plus interest, as of today. Because I assume the City will release the bond forthwith. So you may have a day or two or three.

Ms. Gelineau, is there anything that you need for clarification?

MS. GELINEAU: On the attorney fees, do I just stay silent as to maybe say in the judgment that the parties may reserve their rights to seek fees?

THE COURT: Language like that would be fine. I would rather get the judgment out and then deal with attorney fees.

[16] Mr. Franz, I'll turn to you next. Any questions?

MR. FRANZ: No, I don't have any, Your Honor.

THE COURT: All right. Mr. Crew?

MR. CREW: No, Your Honor. Thank you.

THE COURT: Again, my apologies. Its been a personal embarrassment, but as I say, it's something I can't control.

With that I'll simply await the presentation of documents from both of you.

THE CLERK: Court is adjourned.

(Proceedings concluded.)

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 01-1787-AS

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WEST LINN CORPORATE PARK, LLC,
*Plaintiff*,

v.

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

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ORDER

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(Motion to Reconsider; Motion to Strike)

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ASHMANSKAS, Magistrate Judge:

Plaintiff moves the court to reconsider its oral ruling of July 15, 2005, and defendants move the court to strike plaintiff's motion.

DISCUSSION

Plaintiff's motion is premised on an attempt to characterize its takings claim as a physical appropriation of property rather than a regulatory taking. If plaintiff's claim may be properly characterized as a physical taking, then plaintiff can rely on *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), to argue that it need not have pursued administrative remedies. Then, both its state and federal takings claims are ripe and there is no exhaustion requirement. On the other hand, if plain-

tiff's claim is more appropriately characterized as a regulatory taking, then *Nelson* is distinguishable and administrative remedies must be exhausted as described in *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982), and *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978), as well as *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

The present case, however, does not fit squarely into either the category of a physical taking or the category of a regulatory taking. It is not a physical taking, because no property was taken by the City. (Although certain easements were required, they are not among the challenged conditions.) It is not a regulatory taking because the challenged conditions were not broadly applied as would be the case with zoning restrictions or other classic regulatory restrictions on the use of property. What the City did in the present case is require the developer to construct certain off-site improvements. Plaintiff is not seeking compensation for property taken, but rather reimbursement for construction costs that it claims were exacted in violation of plaintiff's constitutional rights. Such "exaction" cases have not been addressed by the courts to the extent that physical and regulatory takings have. In the absence of controlling case law on exactions it seems more appropriate to apply the case law concerning regulatory takings rather than physical takings. In regulatory takings as well as exaction cases, the property owner is seeking compensation for a loss of value rather than a loss of physical property. In a regulatory taking it is the loss of value of the property caused by a regulation that restricts property use; in an exaction it is the loss of the cost of the challenged off-site improvements. In these situations

where there has not been a physical appropriation of property, the plaintiff should be required to utilize existing administrative procedures before seeking a judicial remedy.

CONCLUSION

Accordingly, plaintiff's Motion to Reconsider Court's Oral Ruling (doc. #206) is GRANTED and, upon further consideration, the court adheres to its oral ruling of July 15, 2005. Defendants' Motion to Strike Plaintiff's Motion to Reconsider Court's Oral Ruling (doc. #207) is DENIED.

IT IS SO ORDERED

DATED this 22nd day of September, 2005.

/s/ Donald C. Ashmanskas
DONALD C. ASHMANSKAS
United States Magistrate Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 01-1787-AS

---

WEST LINN CORPORATE PARK, LLC,
*Plaintiff*,

v.

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

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JUDGMENT ON DECISION BY THE COURT

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This action came on for trial before the Court, Honorable Donald C. Ashmanskas, Magistrate presiding, and the issues having been tried and a decision having been rendered, except that with respect to the disposition of the eighth and ninth claims for relief, these matters were disposed of by an order entered by the Court on a summary judgment record.

The Court incorporates by reference the Findings of Fact and Conclusions of Law made pursuant to Fed. R. Civ. P. 42(a) in its hearing of July 15, 2005, and based upon these findings and conclusions:

It is Ordered and Adjudged, as follows:

1. On the first claim for relief (Inverse Condemnation under Article 1, section 18 of the Oregon Constitution), judgment is entered in favor of Defendants and against Plaintiff.

2. On the second claim for relief (Inverse Condemnation under the United States Constitution), judgment is entered in favor of Defendants, and against Plaintiff.

3. On the third claim for relief (unjust enrichment), judgment is entered in favor of Defendants and against Plaintiff.

4. On the fourth claim for relief (Inverse Condemnation under Article I, section 8 of the Oregon Constitution), judgment is entered in favor of Plaintiff and against Defendants, and Plaintiff is awarded just compensation in the amount of $5,100.00, with interest at the legal rate of nine percent from the date of the taking (June 12, 2000) until paid.

5. On the fifth claim for relief, judgment is entered in favor of Plaintiff and against Defendants, and Plaintiff is awarded just compensation in the amount of $5,100.00 plus interest at the legal rate as provided by the federal law, from the date of the taking (June 12, 2000) until paid. Entry of judgment on the fifth claim for relief is alternative to the entry of judgment on the fourth claim for relief, and in the event the judgment entered on the fourth claim for relief should be set aside, Plaintiff is entitled to entry of judgment on the fifth claim for relief.

6. On the sixth claim for relief (retaliation), judgment is entered in favor of Plaintiff and against Defendants in the amount of $13,053.68.

7. On the seventh claim for relief (retaliation), judgment is entered in favor of Defendants, and against Plaintiff.

8. On the eighth claim for relief (Violation of Civil Rights), judgment is entered in favor of Defendants and against Plaintiff.

9. On the ninth claim for relief (Breach of Annexation Agreement), judgment is entered in favor of Defendants and against Plaintiff.

10. As to Defendants' first counterclaim, judgment is entered in favor of Plaintiff.

11. As to Defendants' second counterclaim, judgment is entered in favor of Plaintiff and against Defendants.

12. As to Defendants' third counterclaim, judgment is entered in favor of Plaintiff and against Defendants.

13. As to Defendants' fourth counterclaim, judgment is entered in favor of Plaintiff and against Defendants.

14. As to Defendants' fifth counterclaim, judgment is entered in favor of Plaintiff and against Defendants.

15. As to Defendants' sixth counterclaim, judgment is entered in favor of Plaintiff and against Defendants.

16. The Court reserves the issue of either party's entitlement to recover attorney fees, except that it extends the time to file motions under Fed. R. Civ. P. 54(d)(2)(B) to no later than thirty days following entry of judgment.

Dated this 22nd day of September, 2005.

/s/ Donald C. Ashmanskas
Donald C. Ashmanskas, Magistrate Judge

Respectfully submitted by:

Schwabe, Williamson & Wyatt, P.C.

By:_____
Donald Joe Willis, OSB #71188
Jill S. Gelineau, OSB #85208
Of Attorneys for Plaintiff,
West Linn Corporate Park, LLC

**APPENDIX D**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

———

No. 05-36061
D.C. No. CV-01-01787-DCA,
District of Oregon, Portland

———

WEST LINN CORPORATE PARK, L.L.C.,
*Plaintiff-Appellee*,

v.

CITY OF WEST LINN, BORIS PIATSKI;
JOHN DOES 1-10,
*Defendants-Appellants*.

———

No. 05-36062
D.C. No. CV-01-01787-DCA,
District of Oregon, Portland

———

WEST LINN CORPORATE PARK, L.L.C.,
*Plaintiff-Appellant*,

v.

CITY OF WEST LINN, BORIS PIATSKI;
JOHN DOES 1-10,
*Defendants-Appellees*.

———

ORDER CERTIFYING QUESTIONS TO THE
OREGON SUPREME COURT

Filed July 28, 2008

Before: Richard C. Tallman and Richard R. Clifton, Circuit Judges, and Edward R. Korman,* District Judge.

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Robert E. Franz, Jr., Esq., Law Office of Robert E. Franz, Springfield, Oregon, for the City of West Linn.

Donald Joe Willis, Esq., Schwabe, Williamson & Wyatt, Portland, Oregon, for West Linn Corporate Park, LLC.

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## OPINION

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West Linn Corporate Park, LLC (WLCP) commenced this action in the Circuit Court for Clackamas County, Oregon, against the City of West Linn and other defendants (collectively the City) alleging that the conditions the City placed on the approval of the development of the West Linn Corporate Park amounted to an inverse condemnation under the Oregon Constitution and an uncompensated taking under the Fifth Amendment to the United States Constitution. The City subsequently removed the matter to the United States District Court for the District of Oregon where the City asserted counterclaims seeking a maintenance bond from WLCP and other equitable relief relating to the vacation of a street abutting WLCP's property.

Following a bench trial, the district court entered judgment in favor of the City on WLCP's inverse condemnation and takings claims with respect to off-site improvements WLCP constructed. The district

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* The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

court also denied the City's counterclaims and granted judgment in favor of WLCP on WLCP's takings and inverse condemnation claim relating to the vacation of the abutting street. Finally, the district court granted judgment in WLCP's favor on its First Amendment retaliation claim. The parties cross appealed, and we consolidated the two cases for review.

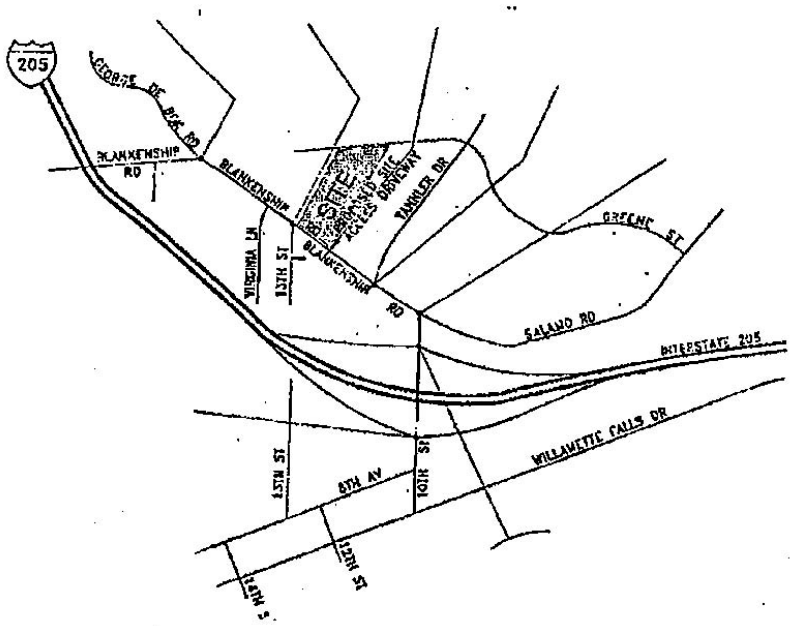
At their core, the issues presented in this appeal are inextricably intertwined with WLCP's claims of inverse condemnation under Oregon law, and federal law requires us to first resolve these state-law causes of action before reaching the merits of the federal takings arguments. *See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (at a minimum, a federal takings claim is not ripe for review unless the State has been given the opportunity to deny with finality just compensation for an alleged taking).

This order certifies to the Supreme Court of Oregon three dispositive questions of Oregon law to guide our federal takings analysis. First, we ask whether a plaintiff bringing an inverse condemnation action alleging that a condition of development amounts to an exaction or a physical taking is required to exhaust available local remedies as a prerequisite to bringing his claim in state court. Second, we ask whether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking. Third, we ask whether the vacation of a street approved by the City Council purporting to act pursuant to Or. Rev. Stat. § 271.110 is *ultra vires* where the

petition does not comply with the landowner consent provisions of Or. Rev. Stat. § 271.080.

I

We provide the following factual background.[1] The history of this case dates back to 1903 when the City of West Linn, Oregon, recorded the Willamette Tracts subdivision plat. As part of the subdivision, Greene Street and 13th Street were dedicated to the City. Greene Street was located on the northern border of the subdivision; 13th Street divided lots four and five on the plat. A modern day approximation is graphically depicted below:




[1] The Supreme Court of Oregon may supplement this statement of facts with any additional information that it deems important from the certified record in order to resolve the certified questions. The parties are obviously free to discuss the factual record in support of their legal positions when they brief the issues before the Supreme Court of Oregon.

On November 4, 1996, the Willamette Christian Church of West Linn conveyed lot five on the plat to Randal Sebastian for $862,553. Sebastian was associated with the Renaissance Development Corporation, and on November 24, 1997, that entity submitted to the City a design review application for what would become the West Linn Corporate Park, owned by the plaintiff in this case. Ultimately, WLCP obtained lot six on the plat as well.

Around the same time, nearby properties in the subdivision began to develop. On February 10, 1998, the City issued a final order approving the "Summerlinn Apartments," a multi-unit residential development owned by Show Timber Company. The apartments would be located to the north of WLCP, and based on Show Timber's proposal, traffic to the apartment complex was to be routed thru the intersection of Greene Street and 13th Street.[2]

On March 6, 1998, the City approved Renaissance's design for the corporate park, albeit with caveats - the approval was conditioned on the construction and delivery of public improvements to the City. Those conditions included fourteen requirements:

1. The applicant shall conform to all Federal, State and Local policies and codes unless granted a written waiver, modification and/or variance by the appropriate deciding body.

2. The applicant shall deed or dedicate along the development's Blankenship Road frontage, and construct half street improvements along Blankenship Road, consistent with the 10th Street corridor study build-out

[2] 13th Street later was renamed "Summerlinn Drive."

pavement width requirements and Chapter 92 of the West Linn Community Development Code (the requested sidewalk and planter strip modification is approved and the City Engineer shall establish the necessary Blakenship pedestrian crossing facilities)[.]

3. The applicant shall improve 13th Street from the development site to Blankenship Road according to the City Engineer's requirements (17% maximum grade as proposed is approved).

4. The applicant shall petition for vacation of the Greene Street right-of-way abutting the site. The City shall not authorize occupancy of any buildings on the site until the vacation is approved or until the Planning Director finds the issue of Greene Street otherwise resolved. The applicant shall construct a four-foot wide gravel path within 20 feet of the existing right of way from 13th Street to the easterly property boundary, or within an easement or new pedestrian pathway dedication retained by the City as a condition of vacation of the right of way. If the right of way is not vacated, the applicant shall install half-street improvements consistent with the Community Development Code or apply for and receive approval of a variance from the City. . . .

5. The applicant shall construct the 10th street corridor improvements required by the City traffic study currently being developed by the traffic engineering consultant Kittleson & Associates. (Minimum improvements for

the development shall be the construction of the two traffic signal lights and associated improvements at the west bound I-205 freeway off-ramp & 10th Street and the 10th Street & Solamo Road/Blankenship Road intersections, along with a sidewalk on the west side of 10th St. from the River Falls Shopping Center sidewalk and 8th Avenue).

6. The applicant shall grant towing and ticketing enforcement rights on the fire, life and safety access corridors within the development.

7. The applicant shall construct the private parking/driveway isles and fire turnarounds not to exceed fifteen percent and eight percent grades respectively,

8. The applicant shall provide a complete pedestrian path between: Building 'A' and the 13th street sidewalk, and between Building 'A' and the gravel path conditioned to be built on the current Greene Street right-of-way.

9. The applicant shall 1) meet the City's water quality requirements by constructing the Storm Drainage Master Plan regional water quality facility or if ODOT does not permit [that] project provide an in-lieu of fee to the City allowed by the City of West Linn Municipal Code . . . , 2) record with the County an agreement with the City that requires the property owner to operate and maintain the private storm detention and water quality facilities, and provide third party certification to the City that it is

working properly on an annual basis, 3) detain the development's storm water run-off with private detention facilities so that 2, 5, 10 and 25-year post development storm drainage release rate is equal to the 2, 5, 10, and 25-year pre-development release rate, 4) extend the 18" storm drainage main stub-out located at Blankenship Road and 13th Street to the proposed private storm system out-fall at the top of 13th Street, and 5) construct the Storm Drainage Master Plan Project . . . (10th Street culvert crossing) or construct a 100-year pre-post private storm drainage detention facility for the development.

10. The applicant shall 1) finance the review of the development's fire and domestic water system demands with the City's new Water Master Plan consultant (Montgomery-Watson) to establish all necessary off-site and onsite water improvements required for the development (The preliminary analysis of the off-site Master Plan water transmission main construction improvements that will be necessary is Phase II of Willamette Falls Drive water transmission main), 2 [ ]) perform actual fire flow tests on the various new private fire hydrants (during an induced high water demand day) that provide proof that the fire flow is adequate to meet each of the buildings fire flow requirements, 3) obtain written approval from the City Engineer and the City Fire Marshall that the necessary fire hydrant flows are available prior to any building related construction with combustible materials, 4) record

with the County an agreement with the City that requires the property owner to provide annual certification to the City's Fire department that the private fire system is operating properly.

11. The applicant shall construct the 13th street master plan sanitary sewer line if Summerlinn Apartments has not successfully received approval for the sanitary sewer inter-basis transfer and the 13th Street master plan line elimination by the time this application needs to complete the 13th Street improvements.

12. The applicant shall construct all of the development's required public improvements prior to receiving any building final inspection and/or certificates of occupancy.

13. To assure adequate protection of trees on site, prior to any site work starting on the property the following shall be completed: [various conditions]

. . .

14. The applicant shall provide for at least six covered bicycle parking spaces.

Following the conditional approval, Sebastian together with Renaissance successfully sought additional investors, formed WLCP, LLC, and transferred the property to the LLC. The corporation's goal, as the name suggests, is to develop and lease business sites.

On October 21, 1998, Sebastian on WLCP's behalf, entered into a public improvements guarantee (PIG) agreement with the City, further memorializing the conditions for the proposed development. Among

other things, the PIG conditioned approval on the completion of the improvements by October 15, 1999. The agreement also required WLCP to secure the completion of the Blankenship and 13th Street improvements and the Greene Street water line with a $264,000 performance bond. WLCP complied.

In February 1998, Kittleson issued to the City the consultant's 10th Street traffic study findings. In light of the construction of WLCP and the Summerlin Apartments, consultant Kittleson recommended adding two additional traffic lights in addition to a sidewalk on the west side of 10th Street. According to the study, "[n]o) additional roadway work" would be required to accommodate the WLCP project.

The consulting engineer's study made further findings. For example, the study estimated that WLCP would be responsible for approximately 5.4 percent of the vehicles entering the 10th Street corridor during afternoon peak hours and 3.3 percent of the vehicles utilizing the I-205 on-ramps during that same time. These figures, however, assumed full occupancy of the surrounding properties predicted to be finalized by 2018.

As a result of the traffic study, including its future predictions, the City required WLCP (1) to improve the westbound I-205 ramps and the 10th Street intersection; (2) widen the street; (3) construct additional turn lanes; (4) improve storm drains; (5) create a bike path; (6) relocate street lighting; (7) move utilities; and (8) install new curbs. The City imposed these conditions in addition to the installation of traffic lights and the sidewalk.

According to WLCP, the costs of these improvements totaled $726,225.48. Because the Summerlinn

Apartment project was subject to the same conditions, WLCP and Show Timber shared the costs. Thus, WLCP paid its half, totaling $363,112.74.

As also noted in the conditional approval, WLCP was required to build Phase II of the City's Willamette Falls Drive waterline. WLCP maintains that initially the City represented that WLCP could build the waterline underneath previously-engineered transmission lines. The anticipated cost of the improvement would be that of installing the pipe. However, the City ultimately required WLCP to build 1400 feet of waterline through solid rock. Although WLCP shared the cost with Show Timber, construction through solid rock increased the total cost. WLCP incurred $172,049 in waterline installation expenses.

Further, as noted above, WLCP was required to petition to vacate Greene Street and create a gravel pathway. According to WLCP, this construction cost it approximately $14,319. In addition, the City conditioned approval on making improvements to Blankenship Road, constructing waterlines along Greene and 13th Streets, and making improvements along 13th Street including the sewer and storm system. WLCP maintains that these improvements cost another $264,970.

Apparently, the City also demanded that WLCP make cash payments to it in impact fees, and WLCP paid $182,544 as "System Development Charges" (SDCs). SDCs represent what the City considers, and attempts to recapture as, 100 percent of costs that result from the impacts of property development. Because the SDCs were more than the cost of the improvements WLCP delivered to the City, WLCP sought reimbursement for the overpayments. In lieu

of paying cash to WLCP, as the City had done for Show Timber, the City provided WLCP with SDC certificates with a face value of $384,450.

SDC certificates, however, are not the functional equivalent of cash. For example, such certificates will only cover up to 50 percent of the SDCs on a future project, may not be exchanged for cash, and are valid only for ten years. To be sure, SDC certificates are alienable: developers may sell them to other developers. But the market for these certificates is small, and the certificates have limited value. In fact, WLCP was only able to sell its certificates for $12,251, a seventy-five percent discount.

WLCP did not meet its construction deadline for all of the public improvements the City required. Nonetheless, WLCP had lined up tenants to occupy the corporate park. Because the improvements remained incomplete, the City was unwilling to issue occupancy permits. Ultimately, after negotiations, WLCP and the City reached a settlement: the City would issue temporary occupancy permits if WLCP agreed to sign a release of certain claims relating to the 10th Street improvements (or the 10th Street corridor as the parties refer to it).[3]

WLCP maintains that the City breached this agreement when it demanded additional improvements to the 10th Street corridor and refused to release the bond with which WLCP secured its performance even though the Oregon Department of Transportation (ODOT) approved its 10th Street improvements and authorized the release of the bond.

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[3] We do not recount the terms of the agreement in full detail because they are not necessary to answer the certified questions.

On November 8, 2001, WLCP commenced this action in the Clackamas County Circuit Court. The City subsequently removed the action to the United States District Court for the District of Oregon. In its nine-count amended federal complaint, WLCP alleged that the conditions the City imposed on the approval of its development worked a taking in violation of the state and federal Constitutions (counts one and two (inverse condemnation)); the City was unjustly enriched by the improvements WLCP constructed (count three); the City effected a taking of a portion of the intersection at Greene and 13th Street in violation of the state and federal Constitutions (counts four and five (inverse condemnation)); the City and co-defendant City Inspector Boris Piatski retaliated against WLCP in violation of the First Amendment for WLCP's speech (counts six and seven); the City violated the Civil Rights Act under Oregon law by treating WLCP differently than other similarly situated developers (count eight); and the conditions the City imposed were in breach of a 1975 annex agreement (count nine).

For its part, the City asserted five counterclaims seeking declaratory and injunctive relief. The City sought an order compelling WLCP to post a maintenance bond with respect to disputed improvements should the district court order the release of the initial bond (counterclaim one); an order compelling WLCP to convey its interests in the Greene Street and the 13th Street intersection to the City (counterclaim two); a declaration that the City's vacation of Greene Street was null and void (counterclaim three); alternatively, an order rescinding the vacation of Greene Street and requiring the vacation to occur based on the consent of all property owners involved (counterclaim four); and an order to abate further

action on the case until the City initiates proceedings to properly vacate Greene Street in accordance with Oregon law (counterclaim five). The City also requested that the district court order WLCP to return the SDC credit certificates in the event damages are awarded.

Thereafter, WLCP filed a motion for partial summary judgment, and the City cross-moved for summary judgment as to all counts. The parties consented to proceedings before United States Magistrate Judge Donald C. Ashmanskas, and he issued an order granting summary judgment to the City on WLCP's eighth and ninth counts. The magistrate judge otherwise denied the cross-motions and set the matter for a bench trial.

The nine-day bench trial commenced on August 30, 2004. On July 15, 2005, Judge Ashmanskas issued his decision orally. He granted relief to WLCP on its inverse condemnation claims set forth in counts four and five and on its claim for unconstitutional retaliation, count six. With respect to the first and second counts' claim of inverse condemnation, the court determined that those counts were unripe for judicial review because WLCP had not availed itself of local remedies. The magistrate judge also reasoned that to the extent those counts related to the 10th Street improvements, WLCP had waived its claims. Finally, the magistrate judge denied relief on WLCP's claim of unjust enrichment (count three) and the City's five counterclaims.

WLCP unsuccessfully moved for reconsideration as to the denial of the inverse condemnation claims, and this timely appeal followed. WLCP challenges only the denial of the first two counts on appeal. The City has cross-appealed and challenges the magistrate

judge's denial of its counterclaims as well as the judgment in favor of WLCP on its claims for inverse condemnation set forth in counts four and five, and WLCP's claim for unlawful retaliation.

II

A

We are mindful that the decision to accept and answer certified questions is left to the Oregon Supreme Court's sound discretion. *See* Or. Rev. Stat. § 28.200; *Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp*., 811 P.2d 627, 630 (Or. 1991). And the jurisdiction of the Oregon Supreme Court is only properly invoked when the certified questions satisfy five statutory criteria. Those criteria require that "(1) [t]he certification must come from a designated court; (2) the question must be one of law; (3) the applicable law must be Oregon law; (4) the question must be one that 'may be determinative of the cause;' and (5) it must appear to the certifying court that there is no controlling precedent in the decisions of this court or the Oregon Court of Appeals." *Id*.; Or. Rev. Stat. § 28.200. As explained more fully below, because the three certified questions of law largely dictate the justiciability of this matter, are not clearly answered under the present state of Oregon law, and plainly implicate the development of local land use law, we believe the better course of action is to request the Oregon Supreme Court to answer them in the first instance.

B

Article III of the Constitution limits the jurisdiction of federal courts to consideration of actual cases and controversies, and federal courts are not permitted to render advisory opinions. *See Rhoades v.*

*Avon Products, Inc*. 504 F.3d 1151, 1157 (9th Cir. 2007) (citing *Pub. Serv. Comm'n v. Wycoff Co*., 344 U.S. 237, 244 (1952)). "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

In *Williamson*, the Supreme Court held that a land owner's Fifth Amendment takings claim against a local government is not ripe until the claimant has availed himself of all the administrative remedies through which the government might reach a final decision regarding the regulations that effect the taking, and any state judicial remedies for determining or awarding just compensation. *See* 473 U.S. at 186 (holding that "[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe"). The first condition, which has come to be known as "prong-one ripeness," requires a claimant to utilize available administrative mechanisms, such as seeking variances from overly-restrictive or confiscatory zoning ordinances, so that a federal court can assess the scope of the regulatory taking. *Id*. at 190-91. The second condition ("prong-two ripeness") is based on the principle that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id*. at 194. Consequently, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [federal] Just

Compensation Clause until it has used the procedure and been denied just compensation." *Id*. at 195.

C

Although *Williamson* arose in the context of an alleged regulatory taking, we have held that physical takings or exactions[4] employ, if at all, a modified form of the *Williamson* analysis. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). In *Daniel*, we explained that under California law, the question was not whether a landowner need satisfy prong-one ripeness. After all, those considerations are "automatically satisfied at the time of the physical taking" for "[w]here there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact." *Id*. Rather, the only pertinent inquiry is prong two. We emphasized that "as in a regulatory takings case, the property owner must [still] have sought compensation for the alleged taking through available state procedures." *Id*.

III

A

The availability, applicability, and adequacy of such state procedures require us to examine Oregon law in this instance. *See id*. We therefore turn to the first basis for our certification order, whether Oregon law requires a landowner alleging a claim of inverse

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[4] The term "physical taking," or a physical intrusion to benefit the public that the government causes to be placed on private property, generally is synonymous with an "exaction," or a condition of development that local government places on a landowner to dedicate a real interest in the development property for public use. *See*, *e.g*., *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

condemnation arising from conditions of development seeking exactions to exhaust available remedies to obtain a final determination from the State that it will pay no compensation. Stated otherwise, was WLCP's complaint filed in the Clackamas County Circuit Court sufficient under Oregon law to seek a final determination of compensation? Because the justiciability of WLCP's takings claims turns on the Oregon Supreme Court's answer, this "question of law" is one that is "determinative of the cause." *Western Helicopter Servs., Inc.*, 811 P.2d at 630.

The Oregon Supreme Court has not had occasion to consider this specific question of exhaustion. Two decisions, however, one from the Oregon Court of Appeals, and another from the Land Use Board of Appeals, reach opposite conclusions, highlighting, we feel, the unsettled nature of this aspect of Oregon law. *Compare Nelson v. City of Lake Oswego*, 869 P.2d 350 (Or. Ct. App. 1994) *with Reeves v. City of Tualatin*, 31 Or. LUBA 11, 1996 WL 33118832 (1996).

In *Nelson*, plaintiff landowners applied to the city for a permit to build a house. After reviewing the application, the city determined that, based on a faulty property description, it would grant the application only after the landowners applied for and obtained a lot line adjustment between their property and the adjoining neighbors. The city approved the landowner's adjustment, but conditioned it upon the execution of "nonremonstrance" agreements in which the landowners agreed not to oppose future street improvements. The city also required the landowners to convey a fifty-five foot drainage easement as a condition of approval. The landowners did not appeal any of the city's conditions as was permitted under the city code, and instead filed suit in state court.

The court of appeals found that all but one of the landowners' claims were subject to exhaustion of local remedies. The condition that the landowners convey the drainage easement, it reasoned, was not. Citing to *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), the Oregon Court of Appeals explained that "[t]here is good reason why the courts have not extended the exhaustion/ripeness requirement to cases like this one [involving an exaction]: They have nothing to do with its purpose." *Nelson*, 869 P.2d at 353. In fact, the purpose of the ripeness requirement stems from the nature of a regulatory taking itself:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.
>
> The tests for regulatory takings under the state and federal constitutions are whether the owner is deprived of *all* substantial beneficial or economically viable use of property. The reason why the exhaustion/ripeness analysis makes sense in that context is that, with rare exceptions, no *particular* denial of an application for a use can demonstrate the loss of all economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive

> authoritative determination of what is legally permitted by the regulations. Therefore, the courts cannot perform their adjudicative function on a claim predicated on a single denial, because something more must be decided by the local or other regulatory authority before there *can* be a demonstrable loss of all use and, therefore, a taking.

*Id*. at 353-54 (internal citations and quotation marks omitted).

By contrast, in the case of an exaction, such as a drainage easement, the court of appeals continued, "the condition has been imposed and the easement has been acquired by the city." *Id*. at 354. As a result, nothing further must occur "at the local or administrative level in order for the claim to be susceptible to adjudication; the only question is whether what *has* occurred *is* a taking under the legal test that the condition must bear a reasonable relationship to the impacts of the use to which the city has attached it." *Id* (citation omitted). Indeed, "[t]he facts on both sides of the equation are readily susceptible to conventional judicial proof, and the adjudication of the facts and of the applicable law is well within the judicial competence." *Id*. The holding in *Nelson* supports the proposition that a landowner need not exhaust local remedies in a physical takings case before bringing his inverse condemnation claim in state court.

*Reeves*, a case that postdates *Nelson*, appears to us to retain language that would, at least in some instances, require exhaustion in an exactions case. In that case, the petitioner sought approval for a fifty-five unit subdivision in the city's low density residential planning district. The city approved the

application, but conditioned it on, among other things, dedicating a ten-foot right of way, improving up to the center line a street abutting the property, paving part of that street, constructing a bicycle lane, and extending a twelve-inch water line for later expansion by the city.

In concluding that the petitioner had not exhausted available remedies, the board of appeals distinguished *Nelson* on two grounds. First, the board explained, "[i]n *Nelson* the applicant could not have anticipated that dedication of an easement would be required. It was simply imposed as part of the approval." *Reeves*, 1996 WL 33118832, at *4. As a result, "[e]ven if a variance process had been available, the first time the applicant would have known of the need to request a variance was after the approval was granted." *Id.* Since petitioner Reeves could have availed himself of such an appeal at the outset, the board concluded that his failure to avail himself of that remedy was fatal.

Second, the board reasoned that at the time of the action, the easement in *Nelson* already had been granted. By contrast, the city had not yet acquired the easement in *Reeves*. Consequently, in the board's view, there was *still* something left to happen at the local level, such as determining the extent to which the city would impose the conditions on petitioner Reeves's property.

In this case, it is undisputed that WLCP exhausted no local remedies that were available before bringing its manifold claims. If the Oregon Supreme Court holds that a plaintiff bringing an inverse condemnation claim premised on allegations of overreaching exactions must first do so, then WLCP's federal takings claims are not yet ripe for our review and we

will dismiss that portion of WLCP's appeal. Because this question of inverse condemnation jurisprudence is unsettled in Oregon, and because, if clarified definitively by the Oregon Supreme Court, the answer will have far-reaching effects on commercial development in Oregon, we have concluded that the better course of action is to certify this issue to the Oregon Supreme Court.

B

The Oregon Supreme Court similarly has not had occasion to consider whether conditions of development that require off-site public improvements, that is, a requirement that a landowner improve public property—outside of the proposed development site—in which the landowner has no property interest can amount to an exaction. One case from the Oregon Court of Appeals of which we are aware squarely answers that question in the affirmative. *See Clark v. City of Albany*, 904 P.2d 185 (Or. Ct. App. 1995). However, a recent Oregon Court of Appeals decision has cast doubt on the continuing validity of Clark. *See Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003).

In *Clark*, the city conditioned the approval of a site plan for a fast food drive-in store on improvements to a nearby street, the drainage system, and sidewalks, among others. Those improvements were codified as conditions four and five, and read as follows:

> 4. Prior to issuance of building permits, design for street improvements for Spicer Road. The improvements shall be for an ultimate width of 36 feet, and shall extend from a point 150 feet east of the subject property east property line to the intersection of the Santiam Highway. The

> design section shall be sufficient for a minor collector street designation. Make design allowances for a commercial driveway intersecting Spicer Road at the current commercial driveway intersection.
>
> 5. Prior to issuance of building permits, provide financial assurances for or construct improvements to Spicer Road. Improvements shall consist of a partial street, drainage, and minimum seven foot curb line sidewalk improvements with appropriate transitions to the east and west of the subject property. Depending on the condition and section of the existing roadway, an overlay may be required on portions of the roadway not being incorporated into the partial street improvement.

*Id*. at 187.

The city maintained that these exactions were not subject to the analysis set forth in *Dolan*, 512 U.S. at 374 (treating exactions as different from regulatory takings and essentially the same as a physical taking), because they "[did] not require a dedication of a property interest to the public or the body from which the development approval [was sought]." *Clark*, 904 P.2d at 189. In rejecting that argument, the court of appeals reasoned:

> [O]n their face, conditions 4 and 5 do impose exactions that are subject to the *Dolan* analysis: They require petitioner, as a prerequisite to developing his property, to make road improvements on and extending beyond the affected property, and the improvements are to be available for some public use.

> We implicitly concluded [that *off-site* improvements that do not require the dedication or transfer of property interest do not amount to exactions] in *J.C. Reeves Corp. v. Clackamas County,* 131 Or.App. 615, 887 P.2d 360 1994), where we applied the *Dolan* test to developmental conditions analogous to conditions 4 and 5 here.
>
> . . .
>
> [T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies *only* to conditions of that kind. This case is not the appropriate one for universal line-drawing because, in our view, there is no relevant and meaningful distinction between conditions that require conveyances and conditions like the fourth and fifth ones here. For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose. The fact that the developer retains title in, or never acquires title to, the property that he is required to improve and make available to the public, does not make the requirement any the less a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records.

*Id*. (citations omitted).

In *Dudek*, the court of appeals suggested that *Clark* was open to question following the United States Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). The Oregon Court of Appeals explained:

> [O]ur holding in *Clark v. City of Albany*, regarding the application of *Dolan* to the imposition of requirements to make off-site improvements is open to question following the Supreme Court's decision in [*Del Monte Dunes*]. In that case, the Supreme Court cautioned against application of the test in *Dolan* beyond "the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use." The recent federal decisions cited suggest such a condition, to the extent that it requires the expenditure of money and not a giving over of a real property interest, might not fall under the same review as a real property exaction requirement of the sort seen in *Dolan*.

*Dudek*, 69 P.3d at 758 n.10.

In this case, it is unclear how Oregon law would classify the conditions placed on the development of the West Linn Corporate Park to improve public property off its site. On the one hand, if the Oregon Supreme Court holds that such conditions can amount to an exaction, then assuming there is no need for exhaustion, we may proceed to analyze the conditions under the *Dolan* framework. If, on the other hand, the Oregon Supreme Court concludes that off-site public improvements do not amount to exactions, then it is unclear whether under Oregon law, there is any viable cause of action for inverse condemnation. As above, this question has poten-

tially broad implications that, if definitively clarified by the Oregon Supreme Court, would affect local level development efforts. An answer would be dispositive as to this portion of the federal appeal.

C

Finally, no Oregon court of which we are aware has had occasion to consider the legal effect of a street that was purportedly vacated by the procedures set forth under Oregon Revised Code § 271.120 but that did not comply with the landowner consent provisions of Oregon Revised Code § 271.080. It is undisputed that the map depicting the portion to be vacated was in error when the petition was circulated for approval by affected landowners in the neighborhood.

As noted, condition of development 4 required WLCP to "petition for vacation of the Greene Street right-of-way abutting the site. The applicant shall construct a four foot wide gravel path within 20 feet of the existing right of way from 13th Street to the easterly property boundary, or within an easement or new pedestrian pathway dedication retained by the City as a condition of vacation of the right of way." This requirement was further codified in the PIG agreement, which noted "[t]hese improvements include waterline improvements on Green[e] Street . . . and the gravel path within the Greene Street vacation area."

In accordance with the City's demand, Show Timber, which was subject to the same condition, employed engineers to draw up a legal description of the proposed vacation of Greene Street. Thereafter, consent of area property owners was obtained based on the legal description. The legal description,

however, did not include the intersection of 13th Street and Greene Street (the disputed intersection).

The proposed vacation was then submitted to the City. However, City planner Eric Spir objected to the proposal, and the City ultimately demanded that Greene Street be vacated in its entirety. The consulting engineers objected to the City's demand because, they reasoned, through traffic on 13th Street would be blocked as a result.

Show Timber and WLCP acquiesced. A new legal description was prepared that included the disputed intersection. This second legal description was incorporated into public notices published for proposes of the vacation and the subsequent public hearing on the matter. Following the public hearing, the City Council approved the vacation of Greene Street in its entirety and passed City Ordinance No. 1439, which codified the vacation.

WLCP contends that Ordinance No. 1439 had the full legal effect of vacating Greene Street, and by operation of law, a portion of the intersection vested in it free of any interest held by the City. The City maintains that the ordinance has no legal effect because it was adopted without the consent of all necessary landowners.

Oregon Revised Code § 271.080(2) requires "the consent of the owners of all abutting property and of not less than two-thirds in area of the real property affected thereby" to "be appended to [the] petition [for vacation], as a part thereof and as a basis for granting the same[.]" It is undisputed that, although the first legal description submitted contained the required landowner consent, the second amended

description that was submitted with the petition did not.

It is otherwise conceded that the statutory formalities were followed. The petition was presented to the city recorder, found to be sufficient, filed, and at least one petitioner was given notice of when the matter would come before the City Council. *See* Or. Rev. Stat. § 271.090. Public notices containing the second legal description were published along with the date for the public hearing. *See* Or. Rev. Stat. § 271.110. Finally, the City Council at a public hearing "hear[d] the petition and any objections [and] . . . determine[d] [that] the consent of the owners of the requisite area ha[d] been obtained, [t]hat notice ha[d] been duly given and [that] the public interest will [not] be prejudiced by the vacation of such . . . street." Or. Rev. Stat. § 271.120. Consequently, the City Council "m[ade] such determination a matter of record and vacate[d] such . . . street[.]" *Id*. It adopted Ordinance 1439.

Thus, the question we confront is whether Ordinance 1439 was an *ultra vires* act because although the City Council followed procedural formalities in its adoption, the petition presented for its consideration did not fully comply with Oregon Revised Statute § 271.080. If the Oregon Supreme Court answers this question in the affirmative, the vacation of Greene Street is null and void, and we must vacate the district court's judgment that an interest in a portion of Greene Street vested in favor of WLCP, *see* Or. Rev. Stat. § 271.140, and the City's use of the disputed intersection worked a taking. If the Oregon Supreme Court answers this question in the negative, the district court's ruling will be affirmed.

## IV

## ORDER

In light of our foregoing discussion, and because the answers to these questions of Oregon law for which there is unclear precedent are determinative of the federal cause, *see* Or. Rev. Stat. § 28.2000, we respectfully certify to the Oregon Supreme Court the following questions under Oregon law:

> (1) Must a landowner alleging that a condition of development amounts to an exaction or physical taking exhaust available local remedies before bringing his claim of inverse condemnation in an Oregon state court?
>
> (2) Can a condition of development that requires a landowner to improve off-site public property in which the landowner has no property interest constitute an exaction?
>
> (3) Under Or. Rev. Stat. § 271.120, is a City Council's purported vacation of a street *ultra vires* when the petition for vacation does not comply with the landowner consent provisions of Or. Rev. Stat. § 271.120?

We do not intend, by the phrasing of these questions, to restrict the Oregon Supreme Court's consideration of the issues. The Oregon Supreme Court may, of course, in its discretion reformulate the questions. *Broad v. Mannesman Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

If the Oregon Supreme Court accepts review of the certified questions, we designate WLCP to file the first brief pursuant to Oregon Rule of Appellate Procedure 12.20.

The Clerk of Court is hereby ordered to transmit forthwith to the Oregon Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all briefs and excerpts of record. Or. Rev. Stat. § 28.215; Or. R. App. P. 12.20.

Further proceedings in this court on the certified questions are stayed pending the Oregon Supreme Court's decision whether it will accept review and, if so, receipt of the answer to the certified questions. The case is withdrawn from submission until further order from this court. The panel will resume control and jurisdiction upon receipt of an answer to the certified questions or upon the Oregon Supreme Court's decision to decline to answer the certified questions. When the Oregon Supreme Court decides whether or not to accept the certified questions, the parties shall file a joint status report informing this court of the decision. If the Oregon Supreme Court accepts the certified questions, the parties shall file a joint status report informing this court when the Oregon Supreme Court issues its answers.

It is so **ORDERED**.

**APPENDIX E**

IN THE SUPREME COURT OF THE
STATE OF OREGON

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WEST LINN CORPORATE PARK, L.L.C.,
*Plaintiff*,

v.

CITY OF WEST LINN, BORIS PIATSKI,
and JOHN DOES 1-10,
*Defendants*.

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WEST LINN CORPORATION PARK, L.L.C.,
*Plaintiff*,

v.

CITY OF WEST LINN, BORIS PIATSKI,
and JOHN DOES 1-10,
*Defendants*.

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FILED: September 23, 2010
(USCA 05-53061, 05-36062; SC S056322)

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On certified questions from the
United States Court of Appeals for the Ninth Circuit;
certification order dated July 29, 2008;
certification accepted December 10, 2008;
argued and submitted September 17, 2009

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Before De Muniz, Chief Justice, and Durham, Balmer, Walters, Kistler, and Linder, Justices.[*]

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[*] Gillette, J., did not participate in the decision of this case.

WALTERS, J.

The certified questions are answered.

Kistler, J., filed an opinion concurring in part and dissenting in part in which Linder, J., joined.

WALTERS, J.

In this case, we answer three questions certified to us by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). The questions arise from an action that West Linn Corporate Park (plaintiff) originally filed in state court against the City of West Linn (the city) alleging that the city effected a taking of plaintiff's property when the city required, as a condition of development of that property, that plaintiff construct off-site public improvements. In that action, plaintiff asserted two claims for inverse condemnation and sought payment of just compensation. The city answered, asserted a counterclaim, and sought invalidation of a city ordinance that vacated a street abutting plaintiff's property. The city then removed the case to federal court. Following a bench trial, the federal district court entered judgment in favor of the city on plaintiff's inverse condemnation claims and in favor of plaintiff on the city's road vacation counterclaim. The parties cross-appealed to the Ninth Circuit, which entered an order certifying the following questions to this court:

> 1. "[W]hether a plaintiff bringing an inverse condemnation action alleging that a condition of development amounts to an exaction or a physical taking is required to exhaust available local remedies as a prerequisite to bringing his claim in state court."

> 2. "[W]hether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking."
>
> 3. "[W]hether the vacation of a street approved by the City Council purporting to act pursuant to [ORS 271.110] is *ultra vires* where the petition does not comply with the landowner consent provisions of [ORS 271.080]."

*West Linn Corporate Park LLC v. City of West Linn*, 534 F3d 1091, 1093-94 (9th Cir 2008) (certification order).

To understand fully the basis for the Ninth Circuit's first two questions, it is necessary to explain in greater detail the procedural history of this case and the inverse condemnation claims that plaintiff filed in state court.[1] In its first claim for relief, plaintiff alleged that, as a condition of development, the city "required [it] to construct and dedicate to the City numerous public improvements for street and water"; that the cost of those improvements was "well beyond what is roughly proportional to the impact of Plaintiff's development"; and that the city's action constituted a taking under Article I, section 18, of the Oregon Constitution.[2] As a result, plaintiff alleged,

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[1] In addition to the claims for inverse condemnation at issue here, plaintiff asserted claims for unjust enrichment, breach of contract, First Amendment retaliation, violation of Equal Protection, and claims for inverse condemnation arising from the vacation of Greene Street. The Ninth Circuit does not pose questions to this court relating to those claims.

[2] Article I, section 18, provides, in part:

it was entitled to payment of just compensation equal to the cost of the improvements that it had constructed.[3]

In its second claim for relief, plaintiff incorporated the facts that it alleged in its first claim for relief—that the city had required it to construct off-site improvements at a cost not "roughly proportional" to the impact of plaintiff's development—but alleged that those facts constituted a taking under the Fifth Amendment to the United States Constitution.[4] Plaintiff alleged that, as a result, it was entitled to payment of just compensation under the Fifth Amendment. In addition, plaintiff alleged that the

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> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]"

[3] In its complaint, plaintiff alleged that it was entitled to just compensation in the amount of $840,260. That amount reflects the total that plaintiff alleged that it spent in construction of off-site street and water improvements, and in System Development Charges (SDCs). The Ninth Circuit does not pose questions that require our consideration of the validity of the SDCs.

[4] The Fifth Amendment provides, in part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Just Compensation Clause of the Fifth Amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment and is binding on the states. *Chicago, Burlington, &c. R'D. v. Chicago*, 166 US 226, 241, 17 S Ct 581, 41 L Ed 979 (1897).

city had violated its civil rights and was liable for attorney fees under 42 USC section 1983.[5]

Plaintiff s allegations that the city effected a taking of its property by imposing costs of construction not "roughly proportional" to the impact of plaintiffs development derive from two United States Supreme Court cases—*Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 2d 677 (1987), and *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994). In *Nollan*, the California Coastal Commission required that, in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house, the plaintiffs grant a public easement across their beachfront lot connecting two public beaches located on either side of the plaintiff's property. 483 US at 828. The commission asserted that requiring the easement was a valid exercise of its regulatory authority to protect and grant visual access to the ocean and that that access would be diminished by construction of the larger house. The Court recognized the commission's interest as legitimate but held that it did not justify requiring that the plaintiffs provide physical access across their property. The Court concluded that, by demanding the easement as

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[5] 42 USC section 1983 makes persons acting under the color of law liable for the violation of the federal constitution or laws. It provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *."

a condition of development, the commission had converted "a valid regulation of land" into "an out-and-out plan of extortion," *id.* at 837 (internal quotation marks omitted), that effected a taking for which just compensation was required, *id*. at 842.

In *Dolan*, although the Court did not see the same "gimmicks" that it had noted in *Nollan*, it again concluded that the city had not established the necessary nexus between the conditions that it wished to impose and the effects of the proposed development. 512 US at 387, 394-96. The plaintiff had applied for a permit to double the size of her retail store and pave her gravel parking lot. The city had required her to dedicate a pedestrian/bicycle pathway and a public greenway along a creek to relieve anticipated increases in congestion and flooding. After concluding that the dedications and the projected impact of the development must be "roughly proportional" to one another and that the city's findings were inadequate to establish that that standard had been met, the Court concluded that the dedications were unconstitutional takings that could not be sustained. *Id*. at 394-96.

In this case, plaintiff alleged that the city's requirement that it construct off-site improvements at a cost not "roughly proportional" to the impacts of its development constituted a taking under the state and federal constitutions, entitling it to payment of just compensation. To obtain that compensation, plaintiff filed two claims for "inverse condemnation": the first asserting that the city had effected a taking under the state constitution; the second asserting that the city had effected a taking under the federal constitution. The term "inverse condemnation" encompasses both of plaintiff's claims. An "[i]nverse condemnation"

claim is any claim "against a governmental agency to recover the value of property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency." *Boise Cascade Corp. v Board of Forestry*, 325 Or 185, 187 n 1, 935 P2d 411 (1997) (internal quotation marks and citation omitted).

Plaintiff appropriately filed both of its claims for inverse condemnation in state court. *See id*. at 187-88 (inverse condemnation action alleging taking under state and federal constitutions in state court); *Coast Range Conifers v. Board of Forestry*, 339 Or 136, 151-55, 117 P3d 990 (2005) (inverse condemnation action alleging taking under federal constitution in state court); *see also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 US 323, 347, 125 S Ct 2491, 162 L Ed 2d 315 (2005) (state courts fully competent to hear federal takings claims). Plaintiff also appropriately filed its section 1983 claim in state court. *See, e.g., Suess Builders v. City of Beaverton*, 294 Or 254, 264-65, 265 n 10, 656 P2d 306 (1982) (entertaining, and noting that state courts generally entertain, claims under section 1983).

If this case had remained in state court, the state trial court would have been required to decide whether plaintiff alleged facts sufficient to assert state claims for just compensation and, if so, whether plaintiff was entitled to compensation and in what amount. The state court's conclusion as to the viability of plaintiff's claims would have depended on that court's determination whether what plaintiff alleged—that plaintiff was required to construct off-site improvements at a cost that was not "roughly proportional" to the impact of plaintiff's development—could amount to a taking under the state constitu-

tion, as plaintiff alleged in its first claim for relief, or under the federal constitution, as plaintiff alleged in its second claim for relief. The state court also would have been required to determine whether state law required exhaustion of administrative remedies as a prerequisite to assertion of those claims. *See id*. at 261-62 (considering those issues).

When the city removed the case to federal court, the federal district court was also presented with those same issues.[6] In addition, however, the federal court was required to address a question particular to the federal forum. As the Ninth Circuit explains in its certification order, the federal district court was required to decide whether plaintiff's second claim for relief, based on the Fifth Amendment, was ripe for its consideration under the Supreme Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985).

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[6] The federal district court was permitted to decide plaintiff's first claim for relief under the doctrine of supplemental jurisdiction. *See* 28 USC § 1367 (with limited exceptions not relevant here, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution"); *Vaden v. Discover Bank*, __ US __, n 18, 129 S Ct 1262, 1277 n 18, 173 L Ed 2d 206 (2009) (citing 28 USC section 1367 and noting that federal courts "routinely exercise supplemental jurisdiction" over state law claims); *see also Chicago v. International College of Surgeons*, 522 US 156, 165, 118 S Ct 523, 139 L Ed 2d 525 (1997) (federal supplemental jurisdiction applies with equal force in cases in which the action has been removed from state court to federal court as a "removed case is necessarily one of which the [federal] district courts have original jurisdiction" (internal citation and ellipsis omitted)).

*Williamson* holds that a plaintiff's federal takings claims are not ripe for consideration by a federal court unless the plaintiff establishes that it first pursued available state court remedies to attempt to obtain payment of just compensation from the state.

The Ninth Circuit explains the Supreme Court's decision in *Williamson* as follows:

> "In *Williamson*, the Supreme Court held that a land owner's Fifth Amendment takings claim against a local government is not ripe until the claimant has availed himself of all the administrative remedies through which the government might reach a final decision regarding the regulations that effect the taking, and any state judicial remedies for determining or awarding just compensation. *See* [473 US at 186] * * * (holding that '[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe'). The first condition, which has come to be known as 'prong-one ripeness,' requires a claimant to utilize available administrative mechanisms, such as seeking variances from overly-restrictive or confiscatory zoning ordinances, so that a federal court can assess the scope of the regulatory taking. *Id*. at 190-91 * * *. The second condition ('prong-two ripeness') is based on the principle that [t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.' *Id*. at 194 * * *. Consequently, 'if a State provides an adequate procedure for seeking just compensation, the property owner

> cannot claim a violation of the [federal] Just Compensation Clause until it has used the procedure and been denied just compensation.' *Id*. at 195[.]"

*West Linn Corporate Park LLC v. City of West Linn*, 534 F3d at 1091, 1099-1100 (9th Cir 2008).[7]

The plaintiff in *Williamson* had filed an action in federal court alleging, under section 1983, that a local government had adopted land use regulations that denied it the economically viable use of its property and seeking damages based on the government's failure to compensate plaintiff for that taking. The Supreme Court ruled that the plaintiff's claim was not yet ripe. Under prong one of its analysis, the Court ruled that the plaintiff had not obtained a final decision from the local government enabling the federal court to determine with certainty the permitted uses of the plaintiffs property[8]. Under prong two of

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[7] In its certification order, the Ninth Circuit refers to the issue as one of jurisdiction. *West Linn*, 534 F3d at 1099. Since the entry of that order, however, the Ninth Circuit has stated that the issue of *Williamson* ripeness is prudential only. *Guggenhiem v. City of Goleta*, 582 F3d 996, 1008-09 (9th Cir 2009), *relying on Suitum v. Tahoe Regional Planning Agency*, 520 US 725, 733-34, 117 S Ct 1659, 137 L Ed 2d 980 (1997).

[8] The Court distinguished between the need for finality, which the Court did require, and exhaustion of administrative remedies, which the Court did not require. The Court stated:

> "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy

its analysis, the Court ruled that the plaintiff had not obtained a decision from the state court denying it just compensation. Under state law, as it had been interpreted by the state court, a property owner that claimed that governmental regulation denied it all economically viable use of its property could obtain compensation by filing an inverse condemnation action in state court. The Supreme Court decided that, because the plaintiff had not demonstrated that that procedure was unavailable or inadequate, the plaintiff's federal claim was premature. The Court stated: "[I]if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 US at 195.

In this case, the federal district court decided that plaintiff's second claim for relief was not ripe under prong two of *Williamson*. The district court ruled that, before plaintiff could file an inverse condemnation action in state court, it was required, by state law, to appeal the city's requirement that plaintiff construct off-site improvements to the city's land use hearings officer, the city council, and finally to the state Land Use Board of Appeals (LUBA). Plaintiff had failed to take those administrative steps and, consequently, had deprived the state court of the opportunity to award just compensation. As a result, the federal district court held that plaintiff's second claim for relief, seeking just compensation under the Fifth Amendment and damages under section 1983,

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if the decision is found to be unlawful or otherwise inappropriate." *Williamson*, 473 US at 193.

was barred.[9] Exercising supplemental jurisdiction, the district court then turned to plaintiff's first claim for relief seeking just compensation under the Oregon Constitution and concluded that plaintiff's failure to pursue available administrative remedies also precluded that claim.

Plaintiff appealed to the Ninth Circuit. To decide whether the district court had erred, the Ninth Circuit was required, as the district court had been, to examine state law and determine whether plaintiff was required to utilize available state procedures before filing its claims for inverse condemnation. The Ninth Circuit concluded that state law is unsettled with respect to whether pursuit of administrative remedies is a prerequisite to an inverse condemnation action premised on a taking under *Dolan* and *Nollan*:

> "The Oregon Supreme Court has not had occasion to consider this specific question of exhaus-

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[9] The district court's analysis is consistent with other federal decisions following *Williamson*. If state law provides a mechanism that a plaintiff must follow to obtain payment of just compensation, a plaintiff's failure to utilize that mechanism precludes federal claims based on the alleged taking. *See*, *e.g., Carson Harbor Village, Ltd. v. City of Carson*, 353 F3d 824, 826 (9th Cir 2004), *cert den*, 543 US 874 (2004) (failure to pursue inverse condemnation claim in state court precluded plaintiff's section 1983 claim); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F3d 651, 661 (9th Cir 2003), *cert dismissed*, 543 US 1041 (2004) (failure to pursue relief under state law claim, precluded federal court from considering federal takings claim); *Kottschade v. City of Rochester*, 319 F3d 1038, 1042 (8th Cir 2003), *cert den*, 540 US 825 (2003) (same); *Baumgardner v. Town of Ruston*, __ F Supp 2d __, ___, 2010 WL 1734830 (WD Wash April 28 2010) (failure to bring administrative land use petition under state law barred federal takings claim).

> tion. Two decisions, however, one from the Oregon Court of Appeals, and another from the Land Use Board of Appeals, reach opposite conclusions, highlighting, we feel, the unsettled nature of this aspect of Oregon law. *Compare Nelson v. City of Lake Oswego*, [126 Or App 416, 869 P2d 350 (1994)], *with Reeves v. City of Tualatin*, [31 Or LUBA 11, 1996 WL 33118832 (1996)]."

*West Linn*, 534 F3d at 1100. Thus, the Ninth Circuit asks this court to answer that question of state law, namely, whether "[plaintiff's] complaint filed in the Clackamas County Circuit Court [was] sufficient under Oregon law to seek a final determination of compensation[.]" *Id.*

The district court's ruling that plaintiff was required to pursue local remedies before filing its claims for inverse condemnation presumed the viability of those claims. If state law does not recognize those claims, then plaintiff's failure to take administrative steps preliminary to their assertion cannot serve as a basis for entry of judgment against plaintiff. The Ninth Circuit therefore also needed to decide a second issue that the state court would have confronted had the case remained within its jurisdiction: does Oregon law recognize claims for inverse condemnation based on allegations that a local government has required a property owner to construct off-site improvements as a condition of development? The Ninth Circuit again considered Oregon law in that regard to be unsettled. In its certification order, the Ninth Circuit states:

> "The Oregon Supreme Court similarly has not had occasion to consider whether conditions of development that require off-site public improve-

> ments, that is, a requirement that a landowner improve public property—outside of the proposed development site—in which the landowner has no property interest can amount to an exaction. One case from the Oregon Court of Appeals of which we are aware squarely answers that question in the affirmative. *See Clark v. City of Albany*, [137 Or App 293, 904 P2d 185 (1995)]. However, a recent Oregon Court of Appeals decision has cast doubt on the continuing validity of *Clark*. *See* Dudek v. Umatilla County, [187 Or App 504, 69 P3d 751 (2003)]."

*Id*. at 1102. As a result, the Ninth Circuit explains:

> "[I]t is unclear how Oregon law would classify the conditions placed on the development of the West Linn Corporate Park to improve public property off its site. On the one hand, if the Oregon Supreme Court holds that such conditions can amount to an exaction, then assuming there is no need for exhaustion, we may proceed to analyze the conditions under the *Dolan* framework. If, on the other hand, the Oregon Supreme Court concludes that off-site public improvements do not amount to exactions, then it is unclear whether under Oregon law, there is any viable cause of action for inverse condemnation."

*Id*. at 1104.

With that background, we return to and repeat the Ninth Circuit's first two questions:

> 1. "[W]hether a plaintiff bringing an inverse condemnation action alleging that a condition of development amounts to an exaction or a physical taking is required to exhaust available local

> remedies as a prerequisite to bringing his claim in state court."
>
> 2. "[W]hether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking."

*Id*. at 1093. In those questions, the Ninth Circuit uses the word "exaction" to mean a governmental action equivalent to a physical taking that entitles a property owner to payment of just compensation.[10] To reflect that meaning and the allegations of plaintiff's complaint, we rephrase the Ninth Circuit's first two questions as follows:[11]

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[10] The Ninth Circuit notes:

> "The term 'physical taking,' or a physical intrusion to benefit the public that the government causes to be placed on private property, generally is synonymous with an 'exaction,' or a condition of development that local government places on a landowner to dedicate a real interest in the development property for public use. *See, e.g., Dolan*."

*West Linn*, 534 F3d at 1100 n 4.

[11] *See Western Helicopter Services v. Rogerson Aircraft*, 311 Or 361, 370-71, 811 P2d 627 (1991) (recognizing this court's discretion to reframe and restate certified questions). Plaintiff and the *amici* that filed a brief in support of the city agree that the Ninth Circuit's questions are more easily analyzed if rephrased. Plaintiff urges us to rephrase the Ninth Circuit's second question as follows: "[W]hether the required condition is an exaction that is subject to the 'rough proportionality' requirements set forth by the United States Supreme Court in *Dolan*." The *amici* ask us to restate the second question as follows: "Can a condition of development that requires a landowner to develop off-site public property in which the

1. Whether a plaintiff bringing an inverse condemnation action alleging that a city imposed, as a condition of development, a requirement that plaintiff construct off-site improvements at a cost not "roughly proportional" to the impacts of the development is required to pursue administrative remedies before filing that claim in state court.

2. Whether a property owner that alleges that a city has required it to construct off-site improvements at a cost that is not "roughly proportional" to the impacts of the development, as opposed to dedicating an interest in real property such as granting an easement, alleges a taking that gives rise to a claim for just compensation.

We proceed to the first question.

## I. WAS PLAINTIFF REQUIRED TO PURSUE ADMINISTRATIVE REMEDIES?

As noted, the Ninth Circuit views Oregon law regarding the pursuit of administrative remedies to be unsettled based on a conflict that it perceives between the decision of the Court of Appeals in *Nelson v. City of Lake Oswego*, 126 Or App 416, 869 P2d 350 (1994), and the decision of LUBA in *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996). In *Nelson*, the plaintiffs alleged that the city had effected a taking of their property under the state and federal constitutions when the city manager required, as a condition of development, that the plaintiffs dedicate a 55-foot easement to the city. The plaintiffs filed judicial claims for inverse condemnation without first

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landowner has no property interest constitute an exaction for which a Fifth Amendment remedy is available?"

appealing the city manager's decision to the city council. The court recognized that plaintiffs who base inverse condemnation claims on use restrictions—claims that the court described as "regulatory takings" claims—must exhaust administrative remedies for two reasons:

> "First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. Therefore, the courts cannot perform their adjudicative function on a claim predicated on a single denial, because something more must be decided by the local or other regulatory authority before there can be a demonstrable loss of all use and, therefore, a taking. *See Suess Builders v. City of Beaverton*, [294 Or 254, 261-62, 656 P2d 306 (1982)]."

126 Or App at 422 (emphasis in original).

However, the court distinguished a local government's requirement that a property owner dedicate real property from such regulatory takings and decided that exhaustion of administrative remedies was not required under the circumstances presented in *Nelson*, because

> "the condition has been imposed and the easement has been acquired by the city. There is nothing left to happen at the local or administrative level in order for the claim to be susceptible to adjudication; the only question is whether

> what *has* occurred *is* a taking under the legal test that the condition must bear a reasonable relationship to the impacts of the use to which the city has attached it. *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437, *cert granted* 510 US 989[, 114 S Ct 544, 126 L Ed 2d 446] (1993). The facts on both sides of the equation are readily susceptible to conventional judicial proof, and the adjudication of the facts and of the applicable law is well within the judicial competence."

*Id*. (emphasis in original).

*Reeves* was a LUBA decision that purported to apply the court's decision in *Nelson*. The petitioner in *Reeves*, like the plaintiffs in *Nelson*, objected to a required dedication of real property. LUBA ruled that the petitioner was required to seek a variance from the city before appealing that requirement to LUBA. LUBA noted that that option had not been available to the plaintiffs in *Nelson*. *Reeves*, 31 Or LUBA at 17. Further, in *Nelson*, the city had acquired the easement at issue, and there was "nothing left to happen at the local level in order for a claim to be susceptible for adjudication." *Reeves*, 31 Or LUBA at 17 (citing Nelson, 126 Or App at 422) (internal quotation marks omitted). In *Reeves*, the city had not yet acquired the easement, and there were other actions that the city could take that could affect LUBA's decision. *Id*. LUBA explained that, until it could

> "ascertain how and to what extent the conditions will be imposed on the petitioner's property, [it would] have no way of determining whether the conditions bear an 'essential nexus' to the impacts of the development and whether any

> exactions are roughly proportional to the impacts of petitioner's proposed development."

*Id*.

In addressing the Ninth Circuit's first question, plaintiff argues that *Nelson* is controlling Oregon law and stands for the proposition that exhaustion is not required when a plaintiff brings an inverse condemnation action based on a taking under *Nollan* and *Dolan*. We disagree. Although we do not apprehend the conflict that the Ninth Circuit sees as rendering Oregon law unsettled, we also do not see *Nelson* as determinative of the question that the Ninth Circuit poses. In this case, the city did not require plaintiff to dedicate real property as a condition of its development. Because the circumstances extant here may argue for exhaustion for the reasons that LUBA stated in *Reeves* and that the Court of Appeals did not have the opportunity to fully explore in *Nelson*, we take up the merits of the first question that the Ninth Circuit poses. We begin with a review of relevant precedent.

In *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 622 n 23, 581 P2d 50 (1978), this court determined that a plaintiff that sought a declaratory judgment that a comprehensive plan was unconstitutional on the basis that it was arbitrary, capricious, and unreasonable as applied was required to exhaust administrative remedies before asserting that claim in court.[12] The comprehensive plan prohibited the plaintiff from building a district shopping center on its property, but local procedure entitled the plaintiff

[12] The plaintiff also brought a claim for inverse condemnation, but the court held that that claim was not cognizable. *Id.* at 609-14.

to seek a zone change or a plan amendment, which, if obtained, would have permitted that development. The court treated the issue as one of exhaustion of administrative remedies and observed that one of the purposes of that doctrine is to permit an administrative body with expertise "to determine[,] at least initially, factual and policy questions with which it is familiar, and, if litigation does result, to provide the reviewing court with a complete and well[-]organized record upon which it may base its judgment." *Id*. at 623 n 23. The court relied on the local planning body's expertise and the principle that "[o]rdinarily those who seek judicial relief must show they have exhausted their administrative remedies" in holding that the plaintiff's failure to exhaust administrative remedies barred his claim. *Id*. at 614 (internal quotation marks omitted).

The court extended the exhaustion requirement of *Fifth Avenue* to a plaintiff's claim for inverse condemnation in *Suess Builders*. In that case, the plaintiff alleged that the city had designated its property for future public acquisition and that that designation constituted a taking for which just compensation was required. The court decided that the plaintiff could not rest its claim on the plan designation, but had to demonstrate that it had sought relief, including pursuing administrative procedures for amending the plan. The court stated that, "if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken." 294 Or at 262.

In *Boise Cascade*, the court declined, however, to require appeal to LUBA as a prerequisite to an inverse condemnation action. 325 Or 185, 935 P2d 411 (1997). Although LUBA has jurisdiction to decide whether governmental action constitutes a compens-

able taking, *Dunn v. City of Redmond*, 303 Or 201, 207, 735 P2d 609 (1987), the court in *Boise Cascade* refused to stay the plaintiff's inverse condemnation action until LUBA had an opportunity to rule, reasoning that the issue presented—whether a taking had occurred—was a constitutional question that fell within an area traditionally adjudicated by courts. *Boise Cascade*, 325 Or at 196.

*Fifth Avenue* and *Suess Builders* impose a requirement that a property owner obtain a clear and final ruling from the local government as to the permitted uses of its property before filing judicial action to challenge limitations on the use of that property. That rule can be viewed as ensuring that the decision of the local government is in truth its final decision or as a general requirement of efficiency in judicial administration. Through either lens, that requirement permits the local government to fully determine and review factual questions about the effect that its regulations have on a particular property and policy questions about whether, given the specific circumstances presented, the government wishes to enforce those regulations. And through either lens, that requirement is of great benefit in avoiding unnecessary litigation or better informing a court should litigation ensue.

With regard to whether Oregon law imposes a requirement of finality or exhaustion before permitting the filing of an action for inverse condemnation, we do not see a significant difference between takings claims that are based on regulations that limit the use of property and those that are based on regulations that place conditions on its development. In either instance, a property owner that asserts objections to the regulations at the local level may obtain

relief from regulatory restraint. In either instance, a requirement that a property owner take administrative steps prior to bringing judicial action permits the local government to determine the necessary effects of the regulations and whether, knowing those effects, it wishes to impose or enforce them. Just as a court benefits by requiring that local governments have the opportunity to assess fully the effects that use limitations have on property owners, so too does a court benefit from requiring that local governments have the opportunity to consider fully whether the conditions on development that it seeks to require are proportional to the impacts of development and whether to insist on imposing those conditions, given the assessment that it makes.

That conclusion does not mean, however, that a landowner must appeal the decision of the local government to LUBA before filing an action for inverse condemnation. LUBA reviews the decisions of local government, but it does not decide facts and cannot make policy decisions for local governments. *See* ORS 197.829(1)(c) (LUBA shall affirm local government's interpretation of a regulation unless that interpretation is inconsistent with underlying policy of comprehensive plan or land use regulation); ORS 197.835(2)(b) (LUBA bound by any findings of fact of the local government for which there is substantial evidence in the record); ORS 197.835(7)(a), (b) (LUBA shall reverse land use regulation if not in compliance with local government's comprehensive plan or the comprehensive plan lacks specific policies which provide the basis for the regulation). Requiring appeal to LUBA would not serve the same purposes

as does requiring the pursuit of local government remedies.[13]

Accordingly, we answer the Ninth Circuit's first question as follows: Assuming that Oregon law permits an inverse condemnation action premised on

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[13] In reaching that conclusion, we do not consider the impact of ORS 197.796, which was not in effect at the time that the city imposed the conditions at issue in this case. That statute requires exhaustion before bringing state court claims for damages and provides, in part:

> "(1) An applicant for a land use decision * * * may accept a condition of approval imposed * * * and file a challenge to the condition[.]
>
> "* * * * *
>
> "(3)(a) A challenge filed pursuant to this section may not be dismissed on the basis that the applicant did not request a variance to the condition of approval or any other available form of reconsideration of the challenged condition. However, an applicant shall comply with ORS 197.763(1) prior to appealing to the Land Use Board of Appeals or bringing an action for damages in circuit court and must exhaust all local appeals provided in the local comprehensive plan and land use regulations before proceeding under this section.
>
> "(b) In addition to [other requirements,] * * * a statement shall be made to the applicant that the failure of the applicant to raise constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court.
>
> "* * * * *
>
> "(6) This section applies to appeals by the applicant of a condition of approval and claims filed in state court seeking damages for the unlawful imposition of conditions of approval in a land use decision, limited land use decision, expedited land division or permit under ORS 215.427 or 227.178."

allegations that a condition of development requires a landowner to construct off-site improvements at a cost not roughly proportional to the impacts of development, Oregon law requires the landowner to pursue available local administrative remedies, but not to appeal to LUBA, as a prerequisite to bringing that action in state court.[14]

In this case, it is undisputed that plaintiff did not use available local procedures to seek to modify or annul the requirement that it construct off-site improvements. *West Linn*, 534 F3d at 1102. Therefore, assuming that plaintiff had viable claims for inverse condemnation against the city, it did not pursue available local administrative remedies before bringing those judicial claims.

## II. DID PLAINTIFF ALLEGE FACTS GIVING RISE TO A CLAIM FOR JUST COMPENSATION?

The Ninth Circuit's second question, as we have restated it, is:

Whether a property owner that alleges that a city has required it to construct off-site improvements at a cost that is not "roughly proportional" to the impacts of the plaintiff's development, as opposed to

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[14] Our decision that pursuit of available local remedies is a prerequisite to an action for inverse condemnation is not inconsistent with *Patsy v. Florida Board of Regents*, 457 US 496, 102 S Ct 2557, 73 L Ed 2d 172 (1982), which holds that exhaustion is not a prerequisite to assertion of a claim under section 1983. A section 1983 claim does not ripen until a landowner's inverse condemnation claim for compensation has been denied. *Suess Builders*, 294 Or at 267. We do not mean to suggest that, if a section 1983 claim is ripe, a landowner must take additional administrative steps before filing a claim under 42 USC section 1983.

dedicating an interest in real property such as granting an easement, alleges a taking that gives rise to a claim for just compensation.

In its second question, the Ninth Circuit asks that we decide the question assumed in responding to its first question—were plaintiff's claims for just compensation as alleged in its first or second claims for relief viable in state court?

We begin with plaintiff's second claim for relief alleging that the city effected a taking under the Fifth Amendment. We realize that beginning with the federal constitution is contrary to our normal practice. *See, e.g., Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (proper sequence is to analyze state law, including constitutional law, before reaching federal constitutional claim). Nevertheless, we do so here because we must determine the viability of both of plaintiff's claims for just compensation to answer the Ninth Circuit's questions, and because plaintiff uses United States Supreme Court cases—*Nollan* and *Dolan*—as the theoretical basis for each of those claims. An initial discussion of Fifth Amendment jurisprudence therefore provides a helpful backdrop for our analysis.

### *A. Did Plaintiff Allege Facts Giving Rise to a Claim for Just Compensation Under the Federal Constitution?*

After *Nollan* and *Dolan*, the Supreme Court decided a case that clarified the constitutional basis of those decisions—*Lingle v. Chevron USA Inc.*, 544 US 528, 548, 125 S Ct 2074, 161 L Ed 2d 876 (2005). In *Lingle*, the Supreme Court began by observing that governmental action that falls into one of the following categories constitutes a taking:

1. A physical invasion of property, *Loretto v. Teleprompter Manhattan CATV Corp*., 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982);

2. A regulation that completely deprives a plaintiff of all economically beneficial use of property, *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992); or

3. A regulation that, on balance, imposes economic impacts that constitute a taking under the several factors identified in *Penn Central Transp. Co. v. New York City*, 438 US 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978).[15]

The Court explained that those categories are intended to describe governmental actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his or her domain. Accordingly, each category describes governmental acts that impose burdens on private property rights. The Court stated:

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[15] *Penn Central* involved the question of whether the designation of New York City's Grand Central Terminal as a historical landmark, and the restrictions on development that that designation imposed, so adversely affected the plaintiffs' economic interests in the property as to constitute a taking requiring just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. 438 US at 107. In deciding that the regulation at issue did not amount to a taking, the Court held that no set formula exists to determine when a regulation will constitute a taking, but it articulated "several factors that have particular significance" in the analysis, primary among which was "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[.]" *Id*. at 124.

> "A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. *See Dolan*[, 512 US at 384]; *Nollan*[,483 US at 831-32]; *Loretto*[, 458 US at 433]; *Kaiser Aetna v. United States*, 444 US 164, 176, 100 S Ct 383, 62 L Ed 2d 332 (1979). * * *
>
> "[T]he complete elimination of a property's value is the determinative factor. *See Lucas*[, 505 US at 1017] (positing that 'total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation'). * * *
>
> "[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."

*Lingle*, 544 US at 539-40 (paragraph structure added for clarity).

In *Lingle*, the Court then declared that other governmental acts that do not impose similarly severe burdens are not subject to challenge under the Takings Clause, but are, instead, subject to challenge under the Due Process Clause. Thus, the Court explained, a property owner's claim under *Agins v. City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), that a governmental regulation is invalid because it does not "substantially advance legitimate state interests" is properly viewed as a claim that due process precludes the regulation entirely, and not as a claim that the takings clause

requires payment of just compensation. The Court stated:

> "Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation in the event of *otherwise proper interference* amounting to a taking. * * * Conversely, if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."

*Lingle*, 544 US at 543 (emphases in original; internal citation and quotation marks omitted).

Although not necessary to its holding, the Court also addressed how its prior decisions in *Nollan* and *Dolan* fit into that paradigm. The claims of the property owners in those cases could have been seen as implicating the Due Process Clause, because they challenged the sufficiency of the nexus between the state interest and the condition imposed and sought judicial invalidation of the condition. However, the claims in those cases also could have been seen as implicating the Takings Clause, because the conditions that the governments imposed required the

property owners to dedicate real property for governmental use—the classic taking in which the government directly appropriates private property. The Court chose neither and placed *Nollan/Dolan* challenges into their own category—a "special application of the 'doctrine of unconstitutional conditions'":

> "Although *Nollan* and *Dolan* quoted *Agins'* language, *see Dolan*, [512 US at 385]; *Nollan*, [483 US at 834], the rule those decisions established is entirely distinct from the 'substantially advances' test we address today. Whereas the 'substantially advances' inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan and Dolan both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings*. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. *See Dolan*, [512 US at 387-88]; *Nollan*, [483 US at 841]. Rather, the issue was whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve *a special application of the 'doctrine of "unconstitutional conditions,"'* which provides that 'the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.' [512 US at 385]. That is worlds apart from a rule that says a regulation affecting property constitutes a taking on

> its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents."

*Id.* at 547-48 (emphases added; original emphases deleted).

Thus, under *Lingle*, in circumstances in which the government exacts "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings," the Supreme Court subjects the government's exaction to a *Nollan*/*Dolan* analysis. *Id*. at 547. Under that analysis, the government is precluded from making the exaction and must pay just compensation for the real property that it acquires unless the exaction is "roughly proportional" to the effect of the proposed development.

The Ninth Circuit's second question requires that we consider the reasoning of the Supreme Court in *Nollan*, *Dolan*, and *Lingle* and decide whether the *Nollan*/*Dolan* analysis extends to a requirement that a property owner construct off-site improvements at a cost that is not "roughly proportional" to the impacts of the owner's development. In *Lingle* terms, we must decide whether such a requirement is "so onerous that, outside the exactions context, [it] would be deemed [a] per se physical taking." *Lingle*, 544 US at 547.

Plaintiff first posits that the Oregon Court of Appeals already has recognized such a requirement as a Fifth Amendment taking and that this court should not disturb that ruling in answering a certi-

fied question. The case that plaintiff deems determinative is *Clark v. City of Albany*, 137 Or App 293, 299, 904 P2d 185 (1995), *rev den*, 322 Or 644, 912 P2d 375 (1996). In *Clark*, the Court of Appeals considered a ruling by LUBA that, as relevant here, applied *Dolan*'s "rough proportionality" standard to development conditions that required the petitioner "to make road improvements on and extending beyond the affected property." The Court of Appeals affirmed the application of that standard, seeing "little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose." *Id*. at 300.

Although we agree with plaintiff's assertion that "[c]ertification is not an appropriate vehicle to obtain clarification of existing law or to test the continued viability of long-standing legal precedent against current conditions," *see Western Helicopter Services v. Rogerson Aircraft*, 311 Or 361, 374, 811 P2d 627 (1991), we do not think that those principles describe the posture of this case. *Clark* was decided in 1995, and, although *Nollan* and *Dolan* both had been decided, the Supreme Court had not had occasion to opine on their reach. In 1999, the Supreme Court decided *Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 US 687, 702, 119 S Ct 1624, 143 L Ed 2d 882 (1999), and stated that it had not extended the application of *Nollan* and *Dolan* "beyond the special context of [such] exactions." As a result of that statement, the Court of Appeals considered its decision in *Clark* "open to question." *Dudek v. Umatilla County*, 187 Or App 504, 516 n 10, 69 P3d 751 (2003). Then, in 2005, the Supreme Court decided *Lingle* and

discussed, in the context of its disaggregation of due process and takings challenges, the jurisprudential underpinnings of *Nollan* and *Dolan*. We choose not to rest on a Court of Appeals case that predated *Lingle*.

On the merits, plaintiff contends that the city's requirement that it use "asphalt, concrete, bedding material, pipe and other personal property" to construct public improvements cannot be distinguished from the requirements imposed by the governments and considered by the courts in *Nollan* and *Dolan*. Plaintiff argues that any coerced transfer of property, whether real or personal, must meet the *Nollan*/*Dolan* standard. The city disagrees and urges that *Nollan* and *Dolan* are limited to required dedications of real property and do not extend to the imposition of an obligation to construct off-site improvements. Such an obligation, the city contends, is, functionally, a monetary obligation that the city has authority to impose to offset the impacts of plaintiff's development. Plaintiff responds that, even if that condition appropriately is characterized as a monetary exaction, the *Nollan*/*Dolan* analysis applies when government uses its regulatory power in an adjudicative proceeding to coerce such payment.

The Ninth Circuit considered a similar question in *McClung v. City of Sumner*, 548 F3d 1219 (9th Cir 2008), *cert den*, 129 S Ct 2765 (2009). The issue in that case was whether a city ordinance that required property owners, as a condition of development, to install storm pipes effected a taking. The Ninth Circuit viewed the ordinance as imposing a monetary obligation and decided that the validity of the condition that it imposed should be subjected to a *Penn Central*, and not a *Nollan*/*Dolan*, analysis. The Ninth Circuit based its decision on the fact that the

condition was legislatively imposed and applied to all development; it was not, as were the conditions in *Nollan* and *Dolan*, a condition imposed in an adjudicatory proceeding on the plaintiff alone.

The Ninth Circuit also stated, as an alternative basis for its ruling, that the property owners had not been required to relinquish an interest in real property:

> "[The City already had an easement for the storm pipe such that the McClungs gave up no rights to their real property. To extend the *Nollan*/*Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers. As noted by *San Remo Hotel [L.P. v. City and County of San Francisco*, 117 Cal Rptr 2d 269, 291, 41 P3d 87, 105 (Cal 2002)], any concerns of improper legislative development fees are better kept in check by 'ordinary restraints of the democratic political process.'"

*McClung*, 548 F3d at 1227-28 (emphasis in original). The Ninth Circuit rejected the plaintiffs' argument that the city had effected a *per se* taking of its money and the plaintiff's citation to *Brown v. Legal Foundation of Washington*, 538 US 216, 123 S Ct 1406, 155 L Ed 2d 376 (2003). In *Brown*, the Supreme Court held that interest that accrued on lawyers' trust accounts (IOLTA accounts) was private property that the state could not acquire without payment of just compensation, but that the plaintiff in that case had suffered no loss for which compensation was due. In *McClung*, the Ninth Circuit distinguished the imposition of a new monetary obligation from the acquisition of accrued interest on an existing account

and noted that *Brown* did not treat the acquisition of accrued interest as an exaction or apply the *Nollan*/*Dolan* analysis to the facts presented.[16] *McClung*, 548 F3d at 1228.

In reaching its conclusion in *McClung*, the Ninth Circuit observed, however, that "[o]ther courts addressing this general issue have come to different conclusions.[17] (Plaintiff asks that we adopt the

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[16] The Ninth Circuit also stated:

> "A monetary exaction differs from a land exaction—'[u]nlike real or personal property, money is fungible.' *United States v. Sperry Corp*., [493 US 52, 62 n 9, 110 S Ct 387, 107 L Ed 2d 290 (1989)]; *see also San Remo Hotel, L.P. v. S.F. City & County*, [364 F3d 1088, 1097-98 (9th Cir 2004), *aff'd*, 545 US 323, 125 S Ct 2491, 162 L Ed 2d 315 (2005)] (stating that the state court's analysis of the state issues 'was thus equivalent to the approach taken in this circuit, which has also rejected the applicability of *Nollan*/*Dolan* to monetary exactions such as the ones at issue here'); *Garneau v. City of Seattle*, [147 F3d 802, 808 (9th Cir 1998)] (upholding a city ordinance that required landlords to pay a $1,000 per tenant relocation assistance fee to low income tenants displaced by the change of use or substantial rehabilitation of a property); *Commercial Builders of N Cal. v. Sacramento*, [941 F2d 872, 873-75 (9th Cir 1991)] (rejecting application of *Nollan* to ordinance that conditioned the issuance of nonresidential building permits on the payment of a fee used to assist in financing low-income housing)."

*McClung*, 548 F3d at 1228.

[17] The Ninth Circuit summarized those differing conclusions as follows:

> "*Compare Clajon Prod. Corp. v. Petera*, [70 F3d 1566, 1579 (10th Cir 1995)] (finding that '[g]iven the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the "essential nexus" and "rough proportionality" tests are

reasoning of one of those courts—that of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates*, 135 SW 3d 620 (Tex 2004). In that case, the town had conditioned its approval of the plaintiff's development on its rebuilding of an abutting road. The Texas court saw "no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved" and held that the *Dolan* standard should apply to both. *Id*. at 640. The court dismissed the town's contention that the doctrine of unconstitutional takings was not applicable "when the thing given up in exchange for a discretionary

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> properly limited to the context of development exactions'); *City of Olympia v. Drebick*, [156 Wash 2d 289, 126 P3d 802, 807-08 (2006)] (rejecting the view 'that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area'); *San Remo Hotel L.P. v. City & County of S.F.*, [27 Cal 4th 643, 117 Cal Rptr 2d 269, 41 P3d 87, 104-05 (2002)] (distinguishing between a fee condition applied to a single property that would be subject to *Nollan*/*Dolan* review, and a generally applicable development fee); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, [187 Ariz 479, 930 P2d 993, 1000 (1997)] (finding that *Dolan* does not apply to a generally applicable legislative decision); *and McCarthy v. City of Leawood*, [257 Kan 566, 894 P2d 836, 845 (1995)] (concluding that nothing in *Dolan* supports its application to impact fees); *with Town of Flower Mound v. Stafford Estates Ltd.,* [135 SW3d 620, 636 (Tex 2004)] (finding that the *Nollan*/*Dolan* analysis is not limited to dedications of land); *and Home Builders Ass'n v. City of Beavercreek*, [89 Ohio St 3d 121, 729 NE2d 349, 356 (2000)] (applying *Nollan*/*Dolan* in 'evaluating the constitutionality of an impact fee ordinance')."

*McClung*, 548 F3d at 1225.

benefit is simply money, for which the owner has no constitutional right of recompense." The court stated:

> "Assuming that the doctrine of unconstitutional conditions is limited as the Town argues, a position on which we express no opinion, the Town's argument does not limit the application of *Dolan* because the doctrine was not the only foundation on which it rested and was not even mentioned in *Nollan*. *Nollan* was grounded entirely in the Supreme Court's takings jurisprudence."

*Id*. at 636.

Of course, as we now know from the Supreme Court's opinion in *Lingle*, the Court's decision in *Nollan* was, indeed, premised on the doctrine of unconstitutional conditions. Understanding that premise, we see a clear distinction between a requirement that a property owner dedicate property to the public and a requirement that a property owner spend money to mitigate the effects of development. In the former circumstance, the government seeks to acquire a landowner's existing real property. To do so, it is required to proceed by the exercise of its power of eminent domain and to pay just compensation. In the latter circumstance, the government does not seek to acquire a landowner's existing real property. It seeks to compel the landowner to pay money to mitigate the effects of development and cannot proceed to do so by instituting eminent domain proceedings. When the landowner makes payment, it does not relinquish existing property; it fulfills a newly imposed monetary obligation. *See* Daniel L. Siegel, *Exactions after Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 Stan Envtl L J 577, 592-601 (2009) (discussing reasons that subjecting permits conditioned on pay-

ment of fees to *Nollan*/*Dolan* analysis cannot be justified doctrinally after *Lingle*).

That does not mean, of course, that monetary obligations could not, at least theoretically, be "so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 US at 547. In *Lingle*, the Court recognized two circumstances in which governmental regulations that impose economic burdens are considered equivalent to physical takings: (1) where the regulation deprives the owner of all viable economic use of the property; and (2) where the regulation is so burdensome that the *Penn Central* standard is met. *Id*. at 539-40. It is conceivable that a local government could require, as a condition of development, monetary obligations so burdensome as to deprive the property owner of all economically viable use of the property, or to meet the *Penn Central* standard, as the Ninth Circuit recognized in *McClung*. If a local government did so, such conditions perhaps could be considered sufficiently onerous to be tantamount to physical takings. But in that circumstance, there would be no need for a *Nollan*/*Dolan* analysis. Conditions imposing burdens of that significance would require payment of just compensation without further inquiry, in contrast to conditions that impose exactions subject to the *Nollan*/*Dolan* analysis. Under *Nollan*/*Dolan*, just compensation is required only when the conditions imposed are not "roughly proportional" to the impacts of development. *See* Charles T. Switzer, *Escaping the Takings Maze: Impact Fees and the Limits of the Takings Clause*, 62 Vand L Rev 1315, 1343-44 (2009) (asserting that only conceivable way for impact fee to amount to *per se* physical taking is if the fee imposed is so high that it

deprives owner of all economically beneficial use of real property).

In *Lingle*, the Court did not express an intent to treat regulations that impose economic burdens that do not deprive a property owner of all economically viable use of property or meet the *Penn Central* standard as takings under the Fifth Amendment. The Court emphasized, as it had in *Monterey v. De Monte Dunes at Monterey*, 526 US 687, 702, 119 S Ct 1624, 143 L Ed 2d 882 (1999), the "special context" in which *Nollan* and *Dolan* arose and pointedly did not categorize the exactions at issue in *Nollan* and *Dolan* as takings, instead analyzing them under the doctrine of "unconstitutional conditions."

In the absence of a Supreme Court ruling to the contrary, we conclude that a government's requirement that a property owner undertake a monetary obligation that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan*/*Dolan* or a taking under the Fifth Amendment, nor does it require payment of just compensation. We also conclude that a requirement that a property owner construct off-site improvements is the functional equivalent of the imposition of a monetary obligation. When a governmental entity requires a property owner to construct improvements, it simply requires the property owner to put money to a particular use. The government could accomplish the same result by requiring the property owner to pay a specified sum, which the government could then use to construct the improvements. The government, through its exercise of the power of eminent domain, can compel neither off-site construction nor the expenditure of money.

That conclusion does not mean, of course, that a property owner required to construct off-site improvements at a cost not roughly proportional to the impacts of its development may not have some other legally sound basis for a claim against the government. The Takings Clause may not be the only constraint on such governmental action. For instance, prior to *Nollan* and *Dolan*, state courts had invalidated governmental conditions that were not "reasonably related" to the impacts of development without relying on the Takings Clause as the basis of their decisions. *See Dolan*, 512 US at 390-91 (noting that a majority of states have adopted common-law rule that there must be "some reasonable relationship or nexus" between required dedication and impact of proposed development).[18] *See also Switzer*,

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[18] The *Dolan* Court cited with approval the following state law cases as exemplars of the "reasonable relationship" test:

> "A number of state courts have * * * require[d] the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, [206 Neb 240, 245, 292 NW2d 297, 301 (1980)], where that court stated:
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> > "'The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.'
>
> "Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not 'occasioned by the

62 Vand L Rev at 1332-36 (explaining common-law "dual rational nexus" test used by various courts). Further, as the Court in *Lingle* acknowledged, the Due Process Clause may serve as a check on arbitrary land use regulation. 544 US at 540; *see also Miller Bros. Co. v. Maryland*, 347 US 340, 342, 74 S Ct 535, 98 L Ed 744 (1954) ("It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law.").

### *B. Did Plaintiff Allege Facts Constituting a Taking Under the Oregon Constitution?*

We turn to whether, under the circumstances alleged in plaintiff's first claim for relief, Oregon law recognizes an inverse condemnation action premised

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> construction sought to be permitted.' *Id*. at [248, 292 NW2d at 302].
>
> "Some form of the reasonable relationship test has been adopted in many other jurisdictions. *See*, *e.g., Jordan v. Menomonee Falls*, [28 Wis 2d 608, 137 NW2d 442 (1965)]; *Collis v. Bloomington*, [310 Minn 5, 246 NW2d 19 (1976)] (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *College Station v. Turtle Rock Corp*., [680 SW2d 802, 807 (Tex 1984)]; *Call v. West Jordan*, [606 P2d 217, 220 (Utah 1979)] (affirming use of the reasonable relation test). Despite any semantical differences, general agreement exists among the courts 'that the dedication should have some reasonable relationship to the needs created by the [development].' *Ibid*. *See generally* Note, *"'Take" My Beach Please*!': Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, [69 B U L Rev 823 (1989)]; *see also Parks v. Watson*, [716 F2d 646, 651-53 (9th Cir 1983)]."

512 US at 390-91.

on a taking under the Oregon Constitution. In interpreting original provisions of the Oregon Constitution, we apply a now-familiar methodology first articulated in *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). This court recently summarized that methodology in the context of interpreting Article I, section 18:

> "[W]e consider the text of Article I, section 18, its history, and the cases interpreting it. Our goal in undertaking that inquiry is to identify the historical principles embodied in the constitutional text and to apply those principles faithfully to modern circumstances."

*Coast Range Conifers v. Board of Forestry*, 339 Or 136, 142, 117 P3d 990 (2005) (citations omitted). In *Coast Range Conifers*, this court analyzed Article I, section 18, to address a different issue—whether that clause addressed only physical takings of property, or whether it also extended to "regulatory takings." Although the issue was different from that presented in this case, much of the analysis is useful to our analysis here.

As originally adopted, Article I, section 18, provided:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in case of the state, without such compensation first assessed and tendered."[19]

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[19] Article 1, section 18, was amended in 1920 and 1924 to add text defining what constitutes a public use. As a result of those amendments, that constitutional provision currently provides:

*Coast Range Conifers* elucidated that text as follows:

> "Because Article I, section 18, was part of the original Oregon Constitution, we look to the meaning of the words that the framers used. *See* Bobo v. Kulongoski, 338 Or 111, 120, 107 P3d 18 (2005) (looking to dictionary relevant to time constitutional provision adopted). In 1857, the word 'take' meant '[i]n *a general sense*, to get hold or gain possession of a thing in almost any manner.' Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis in original). That definition implies that governmental acts that result in the appropriation of private property for public use will constitute a taking—a conclusion that is consistent with the corollary prohibition in Article I, section 18, against demanding or appropriating the uncompensated services of any person. Webster defined 'property' in 1828 both concretely (as '[a]n estate, whether in lands, goods or money') and more abstractly (as [t]he exclusive right of possessing, enjoying and disposing of a thing'). *Id.* Put differently, the dictionary definition of property in 1828 was broad enough to include both the

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"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

> tangible or physical thing and the legal interests pertaining to it."

339 Or at 142-43 (footnote omitted).

After exploring the historical circumstances of the enactment and interpretation of Article I, section 18, the court in *Coast Range Conifers* recognized that a "classic" taking occurs when the government physically occupies or appropriates property, but that physically invasive intentional government action also may rise to the level of a taking. *Id*. at 145; *see also Morrison v. Clackamas County*, 141 Or 564, 569, 18 P2d 814 (1933) (government takes property when it intentionally floods private property for public use). The court also acknowledged that Article I, section 18, is not limited to those circumstances, citing the following cases as examples of other governmental acts that effect takings under Article I, section 18: *Boise Cascade Corp. v Board of Forestry*, 325 Or 185, 198, 935 P2d 411 (1997) (regulations constitute taking if they deny owner any economically viable use of real property); *Dodd v. Hood River County*, 317 Or 172, 182, 855 P2d 608 (1993) (regulatory taking occurs if real property does not retain "some substantial beneficial use"); *Thornburg v. Port of Portland*, 233 Or 178, 192, 376 P2d 100 (1962) (government-authorized overflights constitute taking when they deny owner use and enjoyment of property); *McQuaid v. Portland & V. R'y Co*., 18 Or 237, 22 P 899 (1889) (government act of placing railway in a public street and thereby denying owner access to street constitutes taking); *accord Iron Works v. O.R. & N. Co*., 26 Or 224, 228-29, 37 P 1016 (1894) (explaining and applying *McQuaid*). *Coast Range Conifers*, 339 Or at 145.

The court explained that, although the framers may not have anticipated the precise circumstances detailed in those cases, the framers "would have been aware that governmental actions that did not fit precisely within the classic paradigm of a taking still could be 'equivalent to a taking' and thus entitle the owner to compensation." *Id*. at 145-46. Thus, the issue in *Coast Range Conifers* was whether the governmental action at issue—a state wildlife regulation that prevented plaintiff from logging approximately nine acres of a 40-acre parcel that plaintiff alleged "substantially interfered" with its use of its property—was equivalent to the governmental acts that the court had recognized as takings. The court held that, although "[r]egulation in pursuit of public policy" could be "tantamount to a public appropriation of private property," the regulation at issue did not present that circumstance. The Court applied the "whole parcel rule" and held that the challenged rule did not deprive the plaintiff of all economically viable use of the land and therefore did not effect a taking. *Id.* at 147.

The question that this case presents is similar—whether this court will recognize a condition of development that requires construction of off-site improvements as the modem "equivalent" of a physical taking.[20] Plaintiff does not argue that that condition deprives it of all economically viable use of its land or is of comparable severity and thereby is tantamount to a physical taking. Plaintiff contends instead that

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[20] In *Coast Range Conifers*, the court took care to note that the categories of claims that it described "do not exhaust the field; other categories exist," citing, as an example, condemnation blight cases as a discrete category of takings cases. 339 Or at 147 n 12.

the city's action constitutes a taking because (1) Article I, section 18, applies to the taking of personal property such as livestock or crops, *see Hawkins v. City of La Grande*, 315 Or 57, 67, 843 P2d 400 (1992); *Coos Bay Oyster Coop. v. Highway Com.*, 219 Or 588, 596, 348 P2d 39 (1959); *Bowden v. Davis et al*, 205 Or 421, 434-35, 289 P2d 1100 (1955) (each so applying Article I, section 18); (2) the materials necessary for plaintiff to construct off-site improvements are personal property; and (3) plaintiff was required to transfer those materials to the city.

Although we agree that Article I, section 18, extends to the taking of personal, as well as real, property, we disagree that the city effected a taking of plaintiff's personal property in this case. As we explained in our analysis of the federal constitution, the city did not acquire personal property that plaintiff owned; it required that plaintiff construct public improvements that previously did not exist. That was the functional equivalent of requiring that plaintiff make a monetary payment to the city for a specific purpose—the construction of public improvements.

At the time that the Oregon Constitution was adopted, there was at least a question about whether the government's imposition of such monetary obligations implicated the power of eminent domain, and arguably a consensus that it did not. In 1851, the New York Court of Appeals considered the constitutionality of special assessments imposed to pay the cost of grading and pavement of roads. *People ex rel. Griffin v. City of Brooklyn*, 4 NY 419 (1851). The court began by noting that taxation and eminent domain "rest substantially on the same foundation": In both circumstances, the government takes property for public use, and in both cases, it provides

compensation—in the case of taxation, by the protection and increased value presumed to result from the government services paid for by the tax. *Id*. at 422-23. Nevertheless, the court explained, the power of taxation was distinct from the power of eminent domain. One of the distinctions that the court made was that "[m]oney can always be had by taxation; lands can not [*sic*]; and therefore lands may be taken by right of eminent domain, but money may not." *Id*. at 424.[21] The California Supreme Court also noted that distinction in *Emery v. San Francisco Gas Co*., 28 Cal 345, 350-54 (1865), quoting extensively from *People ex rel. Griffin*, and concluding that "assessments for improvements, upon whatever principle distributed, are not taking private property for public use" because special assessments take only money; "[t]he property referred to in the Constitution for

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[21] The court also explained, however, that equitable apportionment of the assessment—not merely the fact that it involved money—was necessary to its conclusion that the assessment was a tax rather than a taking. The court noted that the expenses of grading and paving the street could have been raised by a general tax, but the legislature had chosen to place the burden on those "whose lands were benefited by the work, and to impose it on them in proportion to the benefit they respectively received therefrom." *Id*. at 425. Specifically, the legislature

> "professed to apportion the tax according to the maxim, that 'he who receives the advantage ought to susta in the burden,' and to exact from each of the parties assessed no more than his just share of the burthen according to this equitable rule of apportionment. The assessment, therefore, was taxation, and not an attempt to exercise the right of eminent domain."

*Id*. Because the assessment was a tax, "any sound objection to the assessment as a tax * * * must be an objection which applies to the principle on which the tax is apportioned[.]" *Id*.

which special compensation must be made, is something other than money, as where land is taken to be used as a street."

In 1867, a legal treatise by the Chief Justice of the Vermont Supreme Court agreed:

> "The principal point of difference [in recent cases] has been to determine where taxation ends, and the tenure of the right of eminent domain begins. Since the decision of the case of [*People ex rel. Griffin*], the courts seem very composedly to have sunk down into the quiet conviction that it is nothing but taxation, and that where the municipal authorities assess the land to its full value for the purpose of assumed improvements, more or less remote from the land, and without regard to the extent of the ratio of equalization, it is still nothing but taxation."

Isaac F. Redfield, 2 *The Law of Railways* 389 (1867) (footnotes omitted). And in 1868, Thomas Cooley also asserted that the right to eminent domain can be exercised over every species of property except money and rights of action. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 526-27 (1868).

In our view, there is not any logical way to apply a takings analysis to the imposition of new monetary obligations.[22] As the Supreme Court helpfully explained in *Lingle*, a takings analysis assumes

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[22] There is a difference, of course, between a government's imposition of a monetary obligation and its seizure of a discrete monetary fund. *See Brown*, 538 US at 232 (distinguishing between tax and seizure of discrete monetary fund, and noting that, if state had attempted to raise same funds through tax, "there would be no question as to the legitimacy of the use of the public's money").

that the government has the power to acquire the property taken; it requires only that the government pay just compensation for that property. It does not make sense to say that, although government has the power to impose a monetary obligation, it must repay the value received as just compensation. The real objection that a property owner has to the imposition of a monetary obligation in excess of what is necessary to mitigate the impacts of development is that the government does not have authority to impose such an obligation, or that the obligation offends some statutory or constitutional provision other than Article I, section 18.

When government regulates the use of a property, it effects a taking if it deprives the owner of all economically viable use of the land. In that instance, the regulation of the property is tantamount to the acquisition of the property. When, instead, the regulation requires that the owner pay a sum of money or use a sum of money for a particular purpose, the regulation is not tantamount to acquisition of the property, even when the obligation exceeds the impact of the development, unless, of course, the obligation is so high that it imposes a burden tantamount to acquisition. Absent additional allegations, a property owner that alleges that a local government has conditioned development on construction of offsite improvements at a cost that is not roughly proportional to the impacts of the development, does not allege a taking under Article I, section 18, of the Oregon Constitution. Plaintiff in this case did not allege such additional facts,[23] and, consequently,

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[23] To the contrary, the facts included in the Ninth Circuit's certification order disclose that plaintiff had lined up tenants to occupy its corporate park, and the city had agreed to issue

plaintiffs claim for inverse condemnation under the state constitution was not cognizable in state court.

We answer the Ninth Circuit's second question, as we have rephrased it, as follows: No, a property owner that alleges that a city has required it to construct off-site improvements at a cost that is not "roughly proportional" to the impact of the development, as opposed to dedicating an interest in real property such as granting an easement, does not allege a taking that gives rise to a claim for just compensation.

## III. THE VACATION OF GREENE STREET

We now address the Ninth Circuit's third certified question:

> "Under [ORS] 271.120, is a City Council's purported vacation of a street *ultra vires* when the petition for vacation does not comply with the landowner consent provisions of [ORS 271.080]?"[24]

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temporary occupancy permits. *West Linn Corporate Park LLC v. City of West Linn*, 534 F3d 1091, 1097-98 (9th Cir 2008). Furthermore, the city contends that after it imposed the conditions of development, but before plaintiff acquired the property, plaintiff's predecessor in interest sold the property for a profit of more than $500,000.

[24] The certified question identified ORS 271.120 as the source of the landowner consent provisions. That appears to have been a clerical error on the part of the Ninth Circuit. As the court correctly noted in its discussion of the issues, ORS 271.080 provides the landowner consent requirements at issue. *See West Linn*, 534 F3d at 1105 ("[T]he question we confront is whether Ordinance 1439 was an *ultra vires* act because[,] although the City Council followed procedural formalities in its adoption, the petition presented for its consideration did not fully comply with [ORS] 271.080.")

*West Linn*, 534 F3d at 1105. That question arises because the city contended, in its counterclaim against plaintiff, that an ordinance that the city adopted vacating a portion of Greene Street abutting plaintiffs property is void and of no effect.

As a condition of development, the city required that plaintiff seek vacation of the portion of Greene Street abutting plaintiff's property. Show Timber, an entity that owned and sought to develop land on the opposite side of Greene Street, also was subject to that same condition. As the Ninth Circuit explains in its certification order, Show Timber began the vacation process:

> "In accordance with the City's demand, Show Timber * * * employed engineers to draw up a legal description of the proposed vacation of Greene Street. Thereafter, consent of area property owners was obtained based on the legal description. * * *
>
> "The proposed vacation was then submitted to the City. However, City planner Eric Spir objected to the proposal, and the City ultimately demanded that Greene Street be vacated in its entirety. The consulting engineers objected to the City's demand because, they reasoned, through traffic on 13th Street would be blocked as a result.
>
> "Show Timber and [plaintiff] acquiesced. A new legal description was prepared that included the disputed intersection. This second legal description was incorporated into public notices published for proposes [*sic*] of the vacation and the subsequent public hearing on the matter. Following the public hearing, the City Council

> approved the vacation of Greene Street in its entirety and passed City Ordinance No. 1439, which codified the vacation.
>
> "[Plaintiff] contends that Ordinance No. 1439 had the full legal effect of vacating Greene Street, and by operation of law, a portion of the intersection vested in it free of any interest held by the City. The City maintains that the ordinance has no legal effect because it was adopted without the consent of all necessary landowners."

*West Linn*, 534 F3d at 1104-05. We understand Ninth Circuit to ask whether the procedural irregularity occasioned by the change in legal descriptions renders the vacation of Greene Street *ultra vires*.

An act of a city or other governmental entity is *ultra vires* when that act falls outside the entity's corporate powers. *Keeney v. City of Salem*, 150 Or 667, 669-71, 47 P2d 852 (1935). When a governmental entity's power is conferred by statute, actions outside the scope of that power are "extra statutory" and therefore *ultra vires*. *See, e.g., State v. United States F. & G. Co. et al.*, 125 Or 13, 24-25, 265 P 775 (1928) (so applying to the context of state highway commission). However, where a city has broad power to act, but is required to exercise that power in conformance with certain procedures or limitations, a failure to so conform does not necessarily render a given governmental action *ultra vires*. For example, in *Kernin v. City of Coquille*, 143 Or 127, 135-36, 21 P2d 1078 (1933), the city charter granted the city council authority to contract, but required that it do so through a competitive bidding procedure. When the city failed to follow that procedure, the court held that the doctrine of *ultra vires* was irrelevant: the

city possessed "ample power" to enter into contracts. *Id*.

To determine the extent of a city's power to vacate its streets, the parties direct us to Oregon statute, specifically the provisions of ORS 271.080 to 271.230, for a description of that authority. Those provisions grant cities authority to vacate streets and, relevant to this case, set forth two procedural mechanisms for doing so.[25] One mechanism allows *any person* to initiate a vacation proceeding (ORS 271.080);[26] the other allows a city governing body[27] to do so (ORS

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[25] A third mechanism applies to vacation of places in cities that are included in port districts. ORS 271.180-271.220.

[26] ORS 271.080 provides, in part:

> "(1) Whenever any person interested in any real property in an incorporated city in this state desires to vacate all or part of any street, avenue, boulevard, alley, plat, public square or other public place, such person may file a petition therefor setting forth a description of the ground proposed to be vacated, the purpose for which the ground is proposed to be used and the reason for such vacation.
>
> "(2) There shall be appended to such petition, as a part thereof and as a basis for granting the same, the consent of the owners of all abutting property and of not less than two-thirds in area of the real property affected thereby. * * * In the vacation of any plat or part thereof the consent of the owner or owners of two-thirds in area of the property embraced within such plat or part thereof proposed to be vacated shall be sufficient, except where such vacation embraces street area, when, as to such street area the above requirements shall also apply. The consent of the owners of the required amount of property shall be in writing."

[27] ORS 271.005(1) defines "[g]overning body" as "the board or body in which the general legislative power of a political subdivision is vested." The city council in this case meets that definition.

271.130).[28] Both mechanisms call for notice and public hearing and, if the vacation is approved, for enactment of an ordinance vacating the street. ORS 271.110-271.130. Another statute expressly provides that the authority granted by those statutes is not exclusive. ORS 271.170.[29] Thus, we can say without hesitation that a city possesses broad power to vacate

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[28] ORS 271.130 provides, in part:

"(1) The city governing body may initiate vacation proceedings authorized by ORS 271.080 and make such vacation without a petition or consent of property owners. Notice shall be given as provided by ORS 271.110, but such vacation shall not be made before the date set for hearing, nor if the owners of a majority of the area affected, computed on the basis provided in ORS 271.080, object in writing thereto, nor shall any street area be vacated without the consent of the owners of the abutting property if the vacation will substantially affect the market value of such property, unless the city governing body provides for paying damages. Provision for paying such damages may be made by a local assessment, or in such other manner as the city charter may provide.

"* * * * *

"(4) Any property owner affected by the order of vacation or the order awarding damages or benefits in such vacation proceedings may appeal to the circuit court of the county where such city is situated in the manner provided by the city charter. If the charter does not provide for such appeal, the appeal shall be taken within the time and in substantially the manner provided for taking an appeal from justice court in civil cases."

[29] ORS 271.170 provides:

"The provisions of ORS 271.080 to 271.160 are alternative to the provisions of the charter of any incorporated city and nothing contained in those statutes shall in anywise affect or impair the charter or other provisions of such cities for the preservation of public access to and from transportation terminals and navigable waters."

its streets and that its failure to exercise that power in accordance with specified procedures does not make its action *ultra vires*.

Even if a city has broad power to act, however, its failure to follow required procedures may, in some instances, render its action void and of no effect. Thus, in *Kernin*, although the city's action in entering into a contract was not *ultra vires*, the city's failure to follow competitive bidding procedures required by its charter rendered the contract void. 143 Or at 137. We would not fully address the city's argument in this case if we limited our discussion to the city's broad power to vacate its streets, and we therefore reframe the Ninth Circuit's question as asking whether the city's failure to obtain the consent of affected landowners rendered the vacation ordinance void and of no effect. *See Western Helicopter Services v. Rogerson Aircraft*, 311 Or 361, 370-71, 811 P2d 527 (1991) (recognizing this court's discretion to reframe and restate certified questions).

This court has not always been consistent or clear in defining the circumstances in which a government's procedural violation renders its action void. In *Nyman v. City of Eugene*, 286 Or 47, 53, 593 P2d 515 (1979), the court considered prior decisions that had used the concept of governmental "jurisdiction" to resolve the issue. In some of those cases, the court had deemed statutory requirements to be "jurisdictional" and decided that the failure to comply with those requirements rendered the governmental action void. In other cases, in which the court had concluded that statutory defects were not "jurisdictional," the court had presumed that the governmental proceedings were regular despite alleged noncom-

pliance. *Id*. at 52-53. After surveying those earlier cases, the court in *Nyman* concluded:

> "It is difficult, if not impossible, to determine from these cases why certain statutory requirements are considered 'jurisdictional' and others not. * * * We are now of the opinion that clear analysis in this area requires that we establish criteria for determining what statutory requirements are *indispensable* to the validity of the challenged action * * * and focus * * * on the specific statutory language that permits the government to affect the rights and obligations of its citizens."

*Id*. at 53 (emphasis added).

The parties in this case do not cite *Nyman* in their arguments. Nonetheless, the parties address the test used in *Nyman*—whether the consent procedure that the city failed to follow was indispensible to the vacation of Greene Street (as the city would have it) or merely a minor irregularity (in plaintiff's terms) not affecting the ultimate validity of the vacation.

That analysis requires consideration of the statutory consent procedures and the role that they play in a city's decision to vacate a street. As noted, there are two relevant statutory mechanisms by which a city may vacate a city street. ORS 271.080(1) permits any person to initiate vacation proceedings. Under that provision, the person files a petition "setting forth a description of *the ground* proposed to be vacated, the purpose for which the ground is proposed to be used and the reason for such vacation." (Emphasis added.) ORS 271.080(2) mandates that the person filing the petition append, "as a part thereof and as a basis for granting the same, the consent of the owners of all

abutting property and of not less than two-thirds in area of the real property affected thereby." After such a petition is filed, the city either may deny the petition or set a time for formal hearing. ORS 271.100. If the city decides to hold a hearing, it is required to publish notice of the hearing. The notice must include, among other things, "*the ground* covered by the petition." ORS 271.110(1) (emphasis added).

ORS 271.130(1)[30] sets forth a second statutory mechanism by which a city governing body may initiate vacation proceedings. Using that mechanism, a city proceeds without the filing of a petition and attached legal description and without consent of affected landowners. The city gives notice of hearing that includes a description of the street to be vacated to abutting and affected landowners. After hearing, the city may vacate the street unless (1) the abutting landowners do not consent and the vacation will substantially affect the market value of such property, unless the city provides for payment of damages; or (2) a majority of the affected landowners object in writing.

The city argues that, in this case, the city council proceeded according to the mechanism initiated by petition outlined in ORS 271.080(1) but

> "did not consider the true 'petition.' * * * Since the 'ground proposed to be vacated' changed by the time of the City Council hearing, it is clear that the City Council considered a different 'petition' than the one that was initially filed after obtaining consent."

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[30] ORS 271.130(1) provides, in part: "Notice shall be given as provided by ORS 271.110[.]"

The consequence of that defect, the city maintains, is that the vacation is "without legal effect," and to hold otherwise would be to eliminate the need for the consent of affected landowners in any vacation proceeding.

Plaintiff argues, on the other hand, that that irregularity is inconsequential. Although the vacation proceedings were initiated by petition and the petition did not describe the disputed intersection, the city's notice of hearing provided the correct description and included the disputed intersection. The abutting landowners, plaintiff and Show Timber, acquiesced in that change, and the record does not disclose a written objection by any affected property owner. Thus, had the city begun the proceedings anew when it decided that vacation of the disputed intersection was warranted, and itself initiated vacation proceedings, the vacation could have been accomplished in accordance with the second mechanism for street vacation outlined in ORS 271.130. When the city revised the street description, it gave affected landowners the same opportunity to file objections to the vacation or to appear at the hearing and oppose the vacation that they would have had had the city used its authority to initiate vacation proceedings from the outset.

Understanding that the consent of affected landowners is significant only when vacation proceedings are initiated by petition, we look to *Nyman* for guidance in assessing the arguments of the patties. *Nyman* involved the widening of a road. There was no affirmative showing that the widening of the road was a public necessity, that plaintiff's predecessor in interest had given written consent to the widening of the road, or that the city had given plaintiff's prede-

cessor notice of the road widening proceeding. 286 Or at 50. The court concluded that, in light of competing legislative goals to ensure that county actions establishing roads are final and unassailable and also that affected property owners receive notice of road proceedings, only the notice requirements were indispensable to the validity of the action. *Id*. at 57. Other statutory requirements that did not render the notice to the property owners ineffectual did not render the county's action void. *Id.*

Similar competing goals are at play in street vacation proceedings. Street vacation affects title to real property, and stability and certainty in real property records is essential. *Cf. Bitte v. St. Helens*, 251 Or 548, 551, 446 P2d 978 (1968) (holding as untimely an appeal from city-initiated vacation ordinance because, where "[t]itle to real property is involved, * * * orderliness and certainty of procedure are extremely important"). By the same token, Oregon statute clearly makes a provision for notice to property owners affected by street vacation and gives them an opportunity to be heard and oppose vacation. If, after notice, a majority of affected property owners object in writing, the city is precluded from vacating the street. However, consent of property owners prior to notice and hearing is necessary only if vacation is initiated by petition. Oregon statute permits city initiation of vacation proceedings without the pre-hearing consent of affected landowners. Thus, that consent is not indispensible to city street vacation, and, in answer to the Ninth Circuit's third question,

we hold that the absence of such consent does not render the vacation ordinance void and of no effect.[31]

The certified questions are answered.

KISTLER, J., concurring in part and dissenting in part.

West Linn Corporate Park (WLCP) filed this action in state court, claiming that the City of West Linn (the city) took its property in violation of the state and federal constitutions when it required WLCP, as a condition of development, to pay for off-site improvements. The city removed the case to federal court, and the United States Court of Appeals for the Ninth Circuit certified three questions to this court. *See* ORS 28.200 (authorizing this court to accept certain certified questions). I agree with the majority's answer to the first and third questions but would answer the Ninth Circuit's second question differently. Specifically, I would decline to give an opinion whether requiring off-site improvements constitutes an exaction for the purposes of the Fifth Amendment. Not only does ORS 28.200 limit certified questions to issues of state law, but there is no need for this court to offer the Ninth Circuit our opinion on federal law.

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[31] In reaching that conclusion, we do not decide that affected landowners would not (or in this case did not) have a right to challenge the validity of the city action. The existence of such remedies is not the question that the Ninth Circuit poses. Instead, as we understand it, the Ninth Circuit asks whether the city ordinance, as it stands, is void. We answer that the failure to satisfy the consent requirements of ORS 271.080 does not render the city's otherwise valid exercise of its power void or without legal effect.

In *Williamson Planning Comm'n v. Hamilton Bank*, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985), the Court held that a federal takings claim will not be ripe in two instances. First, a federal regulatory takings claim will "not [be] ripe until the goverment entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id*. at 186; *see MacDonald, Sommer & Frates v. Yolo County*, 477 US 340, 351, 106 S Ct 2561, 91 L Ed 2d 285 (1986) (explaining that the resolution of a regulatory takings claim depends on first knowing "the extent of permitted development" on the property). Second, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Fifth Amendment] Just Compensation Clause until it has used the procedure and been denied just compensation." *Id*. at 195.

In its opinion certifying the three questions to us, the Ninth Circuit explained that, in this case, only the second prong noted in *Williamson*—whether Oregon "provides an adequate procedure for seeking just compensation"—is at issue. *West Linn Corporate Park v. City of West Linn*, 534 F3d 1091, 1100 (9th Cir 2008). And the Ninth Circuit's opinion suggests that the first two questions that it has certified are, in its view, necessary to resolve that issue. *Id*. For the reasons explained below, I would give a different answer to the court's second question.

The Ninth Circuit's second question asks whether requiring a property owner to pay for an off-site improvement as a condition of development constitutes an exaction. In explaining its question, the Ninth Circuit notes that the Oregon Court of Appeals held, in one decision, that such a requirement would

constitute an exaction under the Fifth Amendment but, in a later decision, questioned that holding. *See id.* at 1102-04 (discussing Oregon Court of Appeals decisions). As both the majority and I understand the Ninth Circuit's second question, it invites us to explain whether, in our view, requiring a developer to pay for off-site improvements constitutes an exaction under the Fifth Amendment. The majority accepts that invitation. I would decline it.

To the extent that the Ninth Circuit asks for our views on the Fifth Amendment, it asks for more than ORS 28.200 permits us to give. ORS 28.200 provides that we may answer certified questions submitted by other courts to resolve potentially determinative issues of Oregon law. *See* ORS 28.200 (authorizing the Oregon Supreme Court to accept certified questions regarding the "law of this state"); *Western Helicopter Services v. Rogerson Aircraft*, 311 Or 361, 365, 811 P2d 627 (1991) (explaining that the certified question must "concern Oregon law, rather than the law of some other jurisdiction"). As the terms of that statute make clear, we may answer only questions of Oregon, not federal, law.[1]

Nor does *Williamson* require us to give the Ninth Circuit our opinion on federal law. The ripeness concern raised in *Williamson* entailed a more limited inquiry. The substantive issue in *Williamson* was whether a government regulation that temporarily prevented a property owner from using its property constituted a taking in violation of the Fifth Amend-

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[1] There may be instances in which answering certified questions of state law requires us to discuss federal law. *See* Klamath Irrigation District v. United States, 348 Or 15, 38 n 15, 227 P3d 1145 (2010). This is not one of them.

ment. 473 US at 185 (identifying that issue). The Court observed that the issue was an open one but declined to reach it because the issue was not ripe. *Id*. It explained that a state violated the Fifth Amendment only if it took property without providing an adequate procedure for obtaining just compensation. 473 US at 194-95. The Court noted that, under the applicable state law, a property owner claiming that restrictive zoning constituted a taking could bring an "inverse condemnation" claim in state court to recover just compensation. *See id*. at 196 (discussing Tennessee law). Without some showing that the state's inverse condemnation procedure was unavailable or inadequate, the existence of that procedure was sufficient for the Court to hold that "until [the property owner] has utilized that procedure, its taking claim [in federal court] is premature." *Id* at 197.

In *Williamson*, the Court did not ask whether the Tennessee courts would recognize that a temporary deprivation constituted a taking before holding that the property owner's failure to bring its claim in the Tennessee courts meant that its claim in federal court was not ripe. Rather, the Court held that the Fifth Amendment claim that the property owner filed in federal court was not ripe, without regard to whether the property owner would win or lose on the merits of its Fifth Amendment claim in state court. Conversely, when the only remedy available in state court for a temporary taking was a declaratory judgment, and not damages, the Court held that the available state procedures were not adequate to provide "just compensation." *First Lutheran Church v. Los Angeles Count*y, 482 US 304, 312 and n 6, 107 S Ct 2378, 96 L Ed 2d 250 (1987); *see Williamson*, 473 US at 194 n 13 (suggesting that conclusion). The

Court accordingly proceeded to reach the substantive federal question in *First Lutheran*—whether regulations that temporarily deprive a property owner of the use of its property violate the Fifth Amendment—that it had declined to reach in *Williamson*.

In my view, the only question raised by the second prong in *Williamson* is whether the procedures for obtaining just compensation in the Oregon courts are adequate. *Williamson* does not require a federal court to determine how the state court will rule on the merits of the landowner's federal takings claim. Were the rule otherwise, the United States Supreme Court would have asked in *Williamson* whether the Tennessee courts would have recognized a temporary taking before holding that the property owner's failure to bring its takings claim initially in the Tennessee courts meant that its federal takings claim was not ripe. The Court did not do so, and there is no need for us to tell the Ninth Circuit how we would rule on the substantive federal question in this case. It is or should be sufficient to say that a property owner who alleges that a local government requirement constitutes an exaction that violates the Fifth Amendment may bring that claim in the Oregon courts and receive all the compensation that the Fifth Amendment requires. Answering whether the property owner would win or lose on its substantive federal claim goes beyond what ORS 28.200 permits and *Williamson* requires.

There is a suggestion in the Ninth Circuit's opinion that it views the scope of an "inverse condemnation claim" as presenting a question of state law, even when the source of law that gives rise to that claim is the Fifth Amendment. As a matter of Oregon law, however, there is no claim for "inverse condemnation"

as such. *Suess Builders v. City of Beaverton*, 294 Or 254, 258 n 3, 656 P2d 306 (1982). Rather, the phrase "inverse condemnation" is

> "only 'the popular description of a cause of action [which we would now refer to as a claim for relief] against a government defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'"

*Id*. (quoting *Thornburg v. Port of Portland*, 233 Or 178, 180 n 1, 376 P2d 100 (1963)); *accord United States v. Clarke*, 445 US 253, 257, 100 S Ct 1127, 63 L Ed 2d 373 (1980). As the court explained in *Suess Builders*, a claim for relief that a government action unconstitutionally took a person's property preceded the use of the phrase "inverse condemnation" as a "popular description" of that claim, 294 Or at 258 n 3, and the nature of the claim turns on the substantive law that gives rise to it, *see First Lutheran*, 482 US at 315 (explaining that form of relief "d[oes] not change the essential nature of the claim"). Describing a claim for relief as an inverse condemnation claim does not convert a claim that finds its source in the federal constitution into a state law claim on which we may offer an opinion pursuant to ORS 28200. For that reason, I would not answer the Ninth Circuit's second question as the majority does.[2]

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[2] This case also raises the question of how, if at all, the second prong of *Williamson* applies when a property owner files its takings claim initially in state court, but the defendant removes the case to federal court. That question presents an issue of federal law for the federal courts, and the majority properly declines to address it.

The Ninth Circuit's first question, by contrast, asks our opinion on an issue of state law. It asks whether a property owner bringing a takings claim for an alleged exaction in state court would first have to exhaust its administrative remedies. Citing the reasons typically advanced for requiring exhaustion of administrative remedies, the majority holds that exhaustion is required in state court as a prerequisite to bringing a takings claim. As the majority correctly clarifies, we would not require exhaustion for a Fifth Amendment takings claim brought pursuant to 42 USC section 1983. *See Patsy v. Florida Board of Regents*, 457 US 496, 516, 102 S Ct 2557, 73 L Ed 2d 172 (1982) (holding that courts may not require exhaustion for actions brought pursuant to section 1983).[3] We would, however, require exhaustion for other claims alleging that an exaction constituted an unconstitutional taking.[4] Some questions remain

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[3] *Williamson* is not to the contrary. The Court was careful to explain in *Williamson*, in discussing the first prong of its ripeness analysis, that the requirement that a property owner apply for a variance or take similar steps before bringing a federal takings claim in federal court was not an exhaustion requirement. 473 US at 192-93. That requirement was instead an aspect of ripeness and resulted from the peculiar nature of a regulatory takings claim; a federal court cannot tell whether a local government regulation goes too far and thus constitutes a taking until the local government has finally decided the extent to which development will be permitted. *Id*.

[4] A landowner may bring a federal takings claim in state court in one of two ways. "[A] landowner is entitled to bring an action in inverse condemnation [for a Fifth Amendment taking] as a result of the self-executing character of the [Fifth Amendment] with respect to compensation." *First Lutheran*, 482 US at 315-16 (internal quotation marks omitted). Alternatively, a landowner may bring a federal takings claim pursuant to section 1983. As the Court explained in *Patsy*, the prohibition against exhaustion derives from congressional intent in

regarding how that state court exhaustion requirement would affect the issue whether WLCP's federal takings claims are ripe for the purposes of Article III.[5] However, those questions are issues of federal law for the Ninth Circuit.

For the reasons stated above, I concur in part and dissent in part from the majority's answers to the certified questions.

Linder, J., joins in this concurring and dissenting opinion.

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enacting section 1983. It does not extend to federal claims brought pursuant to some other claim for relief.

[5] For instance, as long as any Oregon exhaustion requirement is reasonable, it is not clear how the presence or absence of a state court exhaustion requirement affects the question that the second prong of *Williamson* poses—the adequacy of the state judicial procedures for affording just compensation.

**APPENDIX F**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Apr 18 2011]

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No. 05-36061
D.C. No. CV-01-01787-DCA

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WEST LINN CORPORATE PARK L.L.C.,
*Plaintiff - Appellee*,
v.
CITY OF WEST LINN; BORIS PIATSKI;
JOHN DOES 1-10,
*Defendants - Appellants*.

———

No. 05-36062
D.C. No. CV-01-01787-DCA

———

WEST LINN CORPORATE PARK L.L.C.,
*Plaintiff - Appellant,*
v.
CITY OF WEST LINN; BORIS PIATSKI;
JOHN DOES 1-10,
*Defendants - Appellees.*

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Appeal from the United States District Court
for the District of Oregon

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Donald C. Ashmanskas, Magistrate Judge, Presiding
Argued and Submitted March 21, 2011
San Francisco, California

MEMORANDUM[*]

Before: TALLMAN and CLIFTON, Circuit Judges, and KORMAN, Senior District Judge.[**]

This dispute arises from the development of a corporate office park in West Linn, Oregon.[1] Plaintiff West Linn Corporate Park, LLC (WLCP), the developer, brought nine state and federal claims against the city of West Linn and several related co-defendants (collectively, the City). The City raised five counterclaims. Following a bench trial, the magistrate judge granted relief to WLCP on some of its claims, but denied relief on others. The magistrate judge also denied all five of the City's counterclaims. Both parties appealed.

We initially heard oral argument in May 2008 but then vacated submission to certify three dispositive questions of state land-use law to the Oregon Supreme Court. *West Linn Corporate Park, LLC v. City of West Linn*, 534 F.3d 1091 (9th Cir. 2008) [*9th Cir. Certif. Order*]. The Oregon Supreme Court filed its answers to our certified questions in September 2010. *West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29 (Or. 2010). With these answers in hand, we heard a second round of oral argument. We

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, Brooklyn, sitting by designation.

[1] The parties are familiar with the facts, and we repeat them only as necessary to explain our disposition.

now affirm in part, reverse and remand in part, and dismiss in part.

## I

### A

The magistrate judge denied WLCP's state and federal takings claims[2]—brought under the Oregon Constitution and the Fifth Amendment, respectively—relating to the off-site public improvements required by the City (claims one and two). The magistrate judge found these claims were not ripe. We affirm, but on alternative grounds. *See Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 n.4 (9th Cir. 2009) ("[W]e may affirm the district court on any ground supported by the record . . . ." (internal quotation omitted)).

We affirm dismissal of the state takings claim (claim one) because the claim is not cognizable under the Oregon Constitution. The Oregon Supreme Court so held in its answer to our second certified question. *West Linn*, 240 P.3d at 49. Thus, we need not address whether the claim is ripe.

On the analogous federal takings claim (claim two), which we must answer independently, we also affirm the denial of relief. The heart of this Fifth Amendment claim was that the various off-site public improvements required by the City were not "roughly proportional" to the impact of WLCP's proposed office

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[2] WLCP refers to these claims as claims for "inverse condemnation." Inverse condemnation is simply a popular term for a takings claim in which the government has taken property without formal condemnation proceedings. *See United States v. Clarke*, 445 U.S. 253, 257 (1980); *Suess Buildings v. City of Beaverton*, 656 P.2d 306, 309 n.3 (Or. 1982).

park. The rough-proportionality test finds its genesis in two Supreme Court decisions, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Both *Nollan* and *Dolan* involved a plaintiff applying for development permits and, in response, the city requiring the plaintiff to dedicate part of his or her own real property for public use. *Dolan*, 512 U.S. at 379-80; *Nolan*, 483 U.S. at 828. In each case, the Supreme Court held the city had effected a taking, thus requiring just compensation under the Fifth Amendment, because the required dedications were not proportional to the plaintiff's proposed development. *Dolan*, 512 U.S. at 391-96; *Nolan*, 483 U.S. at 834, 838-39.

Here, the conditions of development called for WLCP to construct several off-site public improvements with its personal property (money, piping, sand and gravel, etc.), but they did not require WLCP to dedicate any interest in its own real property. The Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property. *See Lingle v. Chevron USA, Inc.*, 844 U.S. 528, 547 (2005). We decline to do so here. Accordingly, WLCP's second claim does not allege a cognizable federal Fifth Amendment taking.[3] Like the state-law claim, we need not address whether this claim is ripe.

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[3] This is not to say that a plaintiff in a situation like WLCP's could never obtain relief under the Constitution. WLCP might have pled its second claim as a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Instead, WLCP hitched its wagon to *Nollan* and *Dolan*, vehemently denying that this case presents a regulatory taking. Further, even where there is no Fifth Amendment taking, a

**B**

The magistrate judge granted relief to WLCP on its state and federal takings claims relating to the vacation of Greene Street (claims four and five). On these two alternative claims, WLCP received $5,100 in damages, as well as $165,000 in attorney's fees under section 20.077(2) of the Oregon Revised Statutes and 42 U.S.C. § 1988.[4]

This issue turns primarily on whether Ordinance 1439, passed by the West Linn City Council to vacate Greene Street, was valid under Oregon law. In our third certified question, we asked the Oregon Supreme Court to resolve this issue:

> Thus, the question we confront is whether Ordinance 1439 was an *ultra vires* act . . . . If the Oregon Supreme Court answers this question in the affirmative, the vacation of Greene Street is null and void, and we must vacate the district court's judgment that an interest in a portion of Greene Street vested in favor of WLCP, *see* Or. Rev. Stat. § 271.140, and the City's use of the disputed intersection worked a taking. *If the Oregon Supreme Court answers this question in the negative, the district court's ruling will be affirmed*.

*9th Cir. Certif. Order*, 534 F.3d at 1105 (emphasis added). The Oregon Supreme Court ultimately answered the question in the negative, holding that

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plaintiff may have a due process claim against a city's arbitrary conditions of development. *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring). We leave resolution of when such a claim might be viable for another day.

[4] The fee award also accounted for WLCP's success on its claim for retaliation under the First Amendment, discussed next.

Ordinance 1439 was not an *ultra vires* act. *West Linn*, 240 P.3d at 53.

There is nothing left to decide here. The magistrate judge found the vacation of Greene Street vested WLCP with ownership in part of the disputed intersection at Greene and 13th streets. He further found the City had effected a taking of this property when it recorded an easement, without WLCP's permission, allowing public vehicular traffic to continue using the property. These findings of fact were not clearly erroneous.

We thus affirm the $5,100 damages award for WLCP on claims four and five. However, for reasons discussed next, we must remand for reapportionment of the $165,000 fee award.

C

The magistrate judge also granted relief to WLCP on its First Amendment retaliation claim (claim six). He concluded that the City, through its employee Boris Piatski, had unconstitutionally retaliated against WLCP by refusing to release a $264,000 performance bond posted by WLCP. WLCP received $13,053 in damages, and the magistrate judge ordered the City to release the performance bond. The $165,000 attorney's fee award discussed above also accounted for WLCP's success on this claim. We reverse.

To the extent Piatski "retaliated," he did not retaliate against any constitutionally protected conduct by WLCP. The First Amendment protects only conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). The magistrate judge found Piatski had retaliated against WLCP's refusal to

dedicate its interest in the disputed intersection to the City. Even assuming this is true, WLCP's refusal to convey the disputed intersection was not "inherently expressive." *See id*. It did not convey any "particularized message." *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Contrary to WLCP's arguments, refusing to convey the disputed intersection did not equate to petitioning the government for redress. Rather, WLCP was simply asserting what it believed were its property rights as part of its ongoing contractual dispute with the City.

Because there was no First Amendment protected conduct here, we reverse the judgment for WLCP on claim six. We also remand for reapportionment of the $165,000 fee award, which should account only for WLCP's success on its fourth and fifth claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).

II

The City also appeals the magistrate judge's denial of its five counterclaims. In its first counterclaim, the City sought a maintenance bond only if it were ordered to release WLCP's performance bond. Because we are reversing the judgment for WLCP on its sixth claim, to the extent the performance bond remains in force, the City is not required to release it. In either event, the City's first counterclaim is dismissed as moot without prejudice to seeking any necessary relief on this issue on remand.

We affirm the magistrate judge's denial of the second counterclaim. The magistrate judge implicitly found that the public-improvements guarantee (PIG) did not require WLCP to dedicate its interest in the

disputed intersection to the City. This finding was not clearly erroneous.

We also affirm the magistrate judge's denial of the third through fifth counterclaims. These three counterclaims all presumed the city council's vacation of Greene Street was *ultra vires*, and thus null and void. The Oregon Supreme Court held to the contrary in its answer to our third certified question. Accordingly, the third through fifth counterclaims fail.

Each party shall bear its own costs.

**AFFIRMED in part, REVERSED & REMANDED in part, DISMISSED in part.**

**APPENDIX G**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jun 07 2011]

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Nos. 05-36061, 05-36062
D.C. No. CV-01-01787-DCA
District of Oregon,
Portland

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WEST LINN CORPORATE PARK L.L.C.,
*Plaintiff - Appellee*,
v.

CITY OF WEST LINN; et al.,
*Defendants - Appellants*.

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ORDER

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Before: TALLMAN and CLIFTON, Circuit Judges, and KORMAN, Senior District Judge.*

The panel has voted to deny the petition for panel rehearing; Judges Tallman and Clifton have voted to deny the petition for rehearing en banc and Judge Korman so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, Brooklyn, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.