IN THE SUPREME COURT OF THE STATE OF OREGON

WEST LINN CORPORATE PARK, L.L.C., Plaintiff, v. CITY OF WEST LINN, BORIS PIATSKI and JOHN DOES 1-10, Defendants.	Supreme Court No. S056322 US Court of Appeals for the Ninth Circuit No. 05-53061, 0536062

BRIEF *AMICUS CURIAE* FOR THE LEAGUE OF OREGON CITIES, AMERICAN PLANNING ASSOCIATION, AND THE OREGON CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT CITY OF WEST LINN

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I. QUESTIONS OF LAW PRESENTED FOR REVIEW

This case involves claims by a property owner that conditions of a land use approval, and the subsequent efforts by the City of West Linn to obtain re-dedication of a purportedly vacated street area, effected takings of private property without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. This Court has accepted certification of three questions of law from the United States Court of Appeals for the Ninth Circuit, where the merits of the case are on appeal:

1. Must a landowner alleging that a condition of development amounts to an exaction or physical taking pursue available local remedies before bring his claim of inverse condemnation in an Oregon state court?
2. Can a condition of development that requires a landowner to develop off-site public property in which the landowner has no property interest constitute an exaction?
3. 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 271.120?

II. INTERESTS OF *AMICI*

Amicus curiae the American Planning Association ("APA") and its Chapters, including as an additional *amicus* the Oregon Chapter, are committed to stable, coherent, policy-driven and future-oriented comprehensive planning to ensure that communities are good places to live, offer a wide range of opportunities for our citizens, and preserve resources and opportunities for future generations as well.

Amicus curiae the League of Oregon Cities is a state-wide association comprised of all 242 of Oregon's incorporated cities, whose mission is: "To strengthen and support livable communities."

Amici are particularly concerned that the Court avoid an overly broad construction of what constitutes an "exaction" under the Fifth Amendment of the United States Constitution, or a "taking" under Oregon Constitution Article I, Section 18, and that the Court continue to respect the appropriate division of jurisdiction between the Land Use Board of Appeals and the courts in review of conditions of approval of land use applications. These *amici* file this brief in support of the City of West Linn, addressing only the first two certified questions.

III. RULES OF LAW TO BE ESTABLISHED

1. A landowner alleging that a condition of development amounts to an exaction or physical taking recognizable under the Fifth Amendment must pursue available local and state administrative remedies before bringing any claim for inverse condemnation in an Oregon state court.
2. A condition of development that requires a landowner to develop off-site public property in which the landowner has no real property interest does not constitute an "exaction," or taking, for which just compensation is owed under either the Oregon or United States Constitution.

IV. SUMMARY OF THE ARGUMENT

Ordinarily, before a landowner may bring a claim for damages in federal court, asserting that the government has violated the owner's federally protected

constitutional rights by taking private property without just compensation, that owner must first have "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." *West Linn Corporate Park v. City of West Linn*, 534 F.3d 1091,1099 (9th Cir. 2008), citing *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 186 (1985). The Ninth Circuit has certified the first question so it can assess the "availability, applicability, and adequacy" of Oregon's procedures for adjudicating the constitutionality of conditions of land use approvals, in order to determine whether West Linn Corporate Park's (hereinafter "WLCP") federal claim is ripe and justiciable.

Amici submit that Oregon law provides available, applicable and adequate administrative and judicial review of the constitutionality of conditions of land use approvals, and requires landowners to pursue them prior to instituting inverse condemnation actions in the courts of this State. WLCP and its supporting *amici* conflate all of the types of government imposed obligations into a single category – a physical confiscation of property by the government giving rise to money damages. That conflation requires not only a contortion of logic, but also of existing law, to transmute a series of off-site improvement obligations into physical takings, and to excuse WLCP's allowing all time limitations to challenge these conditions to pass. Avenues available to WLCP to challenge the conditions included appeal of the site plan approval to the Planning Commission, City Council and ultimately the Land Use Board of Appeals ("LUBA"). After the decision was final, WLCP could have sought

to modify the site plan approval through a variance or other process. Oregon law, as recognized by the courts of this State at the time these conditions were imposed, and as codified thereafter by enactment of ORS 197.796, requires an owner to pursue all local remedies and proceed to LUBA to bring a takings claim. No property owner should reap the benefit of gaining city approval by choosing not to appeal and then, after the approval is secured and appeal periods have passed, be permitted to challenge the city's conditions of approval in an action for damages.

The answer to the Ninth Circuit's first certified question, therefore, is that a landowner alleging that a condition of development amounts to an unconstitutional exaction or physical taking must pursue available local remedies before bringing a claim of inverse condemnation in an Oregon state court, and requires an appeal to LUBA as well.

The reason the Ninth Circuit has given for asking the second question, namely whether conditions of approval requiring off-site improvements are "exactions," is that, in the Circuit's view, if "such conditions can amount to an exaction, . . . we may proceed to analyze the conditions under" *Dolan v. City of Tigard*, 512 U.S. 374 (1994), but that, if they "do not amount to exactions, then it is unclear whether, under Oregon law, there is any viable cause of action for inverse condemnation." *West Linn*, 543 F.3d at 1104. *Amici* respectfully submit that this premise is somewhat flawed. The question of whether a condition of approval is an "exaction" subject to *Dolan* is, of course, a question of federal law, *i.e.*, of the reach of the Fifth Amendment's promise of just compensation for the taking of private property. The Oregon cases considering the question all have attempted to apply teachings of the

United States Supreme Court regarding whether the imposition of a given condition requires the government to compensate the landowner *as a matter of federal constitutional law*. As *amici* will explain, the United States Supreme Court has clarified that requirements such as the off-site improvements in this case are not physical exactions of land subject to *Dolan*. That does not mean that the requirements cannot be challenged as takings under the Fifth Amendment or otherwise under the federal due process clause;[1] it means only that they must be analyzed under some other of the various tests for determining whether a government regulation is a "taking" under the Fifth Amendment. And that challenge may be pursued through the administrative and judicial processes provided under Oregon law.

The Ninth Circuit's question appears to confuse the process and the result. In other words, the *result* of a *Dolan* inquiry should be the same, whether the Oregon courts or LUBA perform it in reviewing a challenge to a condition of approval or whether the federal courts perform it in assessing a subsequent damage claim alleging a "taking." That is because what constitutes a Fifth Amendment "taking" is a question ultimately determined as a matter of federal law by the Supreme Court of the United States. What is important to our inquiry, however, is that any property owner has the opportunity to assert than any condition imposed upon his development is a "taking" requiring compensation, both through the administrative land use system (including its provisions for judicial review), and, thereafter, in suits for damages.

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[1] The court need not determine whether Petitioner could proceed under another taking theory such as a *Lucas*-type 'total regulatory taking' or a *Penn Central*- type taking. *See Lingle v. Chevron USA,* 544 US 548 (2005).

WLCP claims that the condition requiring the off-site road improvements was a "physical taking" subject to "rough proportionality" analysis under *Dolan v. City of Tigard,* 512 U.S. 374 (1994). Although there may be many types of exactions, in terms of the Fifth Amendment guarantees, *Dolan* imposes two key limitations: (1) *Dolan* is limited to dedications of land; (2) which are *ad hoc* in nature. *Id.* at 384-385. The conditions challenged here were off-site improvements requiring the payment of money; the number and scale of these improvements was triggered by legislative determinations that were never challenged. Under the law as established by the United States Supreme Court, these conditions are not exactions subject to *Dolan's* "rough proportionality" analysis.

The answer to the second certified question, therefore, is that an obligation to develop off-site improvements on public property does not require any "dedication of property" and, therefore, does not constitute an exaction subject to heightened scrutiny under *Dolan v. City of Tigard*, but that this is so as a matter of federal law. Had WLCP chosen to do so, it could have pursued its federal constitutional challenges to the conditions through the processes provided by the State of Oregon, in addition to any challenges under Art. 1, §18 of the Oregon Constitution, but the result of those federal challenges should have been the same as it would be if decided by the federal courts.

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V. ARGUMENT

Question 1: Must a landowner alleging that a condition of development amounts to an exaction or physical taking exhaust available local remedies before bring his claim of inverse condemnation in an Oregon state court?

The answer to this question is, "yes." There are three distinct exhaustion scenarios relating to conditions of approval of a land use application that are implicated by the Ninth Circuit's question: (a) the property owner/applicant affirmatively accepts, or at least never objects to, the conditions of approval imposed by the local government; (b) the property owner/applicant opposes the conditions of approval within the local agency, but does not take advantage of administrative review opportunities within the local government (*e.g.*, an appeal to the Planning Commission and City Council); or (c) the property owner opposes the conditions to the final local decision maker but does not seek review before LUBA. *Amici* submit that, in every case, the failure of the property owner/applicant to pursue the available administrative remedy (but rather chose to lie in the weeds until well after construction is completed) bars a subsequent action for damages.

The Legislature definitively answered this question in 1999, when it adopted ORS 197.796.[2] That statute permits a property owner to accept the conditions of a

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[2] ORS 197.796 provides:

> (1) An applicant for a land use decision, limited land use decision or expedited land division or for a permit under ORS 215.427 or 227.178 may accept a condition of approval imposed under ORS 215.416 or 227.175 and file a challenge to the condition under this section. Acceptance by an applicant for a land use decision, limited land use decision, expedited land division or permit under ORS 215.427 or 227.178 of a condition of approval imposed under ORS 215.416 or 227.175 does not constitute a waiver of the right to challenge the condition of approval. Acceptance of a condition may include but is not

limited to paying a fee, performing an act or providing satisfactory evidence of arrangements to pay the fee or to ensure compliance with the condition.

(2) Any action for damages under this section shall be filed in the circuit court of the county in which the application was submitted within 180 days of the date of the decision.

(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 the requirements of ORS 197.763 (5), at the commencement of the initial public hearing, 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.

(c) An applicant is not required to raise an issue under this subsection unless the condition of approval is stated with sufficient specificity to enable the applicant to respond to the condition prior to the close of the final local hearing.

(4) In any challenge to a condition of approval that is subject to the Takings Clause of the Fifth Amendment to the United States Constitution, the local government shall have the burden of demonstrating compliance with the constitutional requirements for imposing the condition.

(5) In a proceeding in circuit court under this section, the court shall award costs and reasonable attorney fees to a prevailing party. Notwithstanding ORS 197.830(15), in a proceeding before the Land Use Board of Appeals under this section, the board shall award reasonable costs and attorney fees to a prevailing party.

(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,

land use decision (and, therefore, to proceed with development), and still challenge the condition in LUBA or the courts. But ORS 197.796(3)(a) provides that "an applicant shall comply with ORS 197.763(1) prior to appealing to the LUBA or bringing an action for damages in circuit court and must pursue all local appeals provided in the local comprehensive plan and land use regulations before proceeding under this section." ORS 197.796(6) makes clear that this statute "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." It is clear from the context of ORS 197.796 that the statute applies to claims based on "any challenge to a condition of approval that is subject to the Takings Clause of the Fifth Amendment to the United States Constitution." ORS 197.796(4).

Before a person who claims that a condition of approval of a land use decision effects a "taking" of property may bring an inverse condemnation action in the courts of this State, the person must first: (a) raise and preserve the issue before the local government (as required by ORS 197.763(1)); and (b) "exhaust all local appeals provided in the local comprehensive plan and land use regulations." ORS 197.796(3)(a).

Had the conditions at issue in this case been imposed after the effective date of ORS 197.796, the statute would clearly dispose of this question. However, the

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limited land use decision, expedited land use division or permit under ORS 215.427 or 221.178.

off-site improvements that WLCP now seeks to challenge were required as part of a land use approval in 1998. So, the question becomes whether ORS 197.796 changed the law, or merely codified the existing law requiring administrative exhaustion of claims challenging the constitutionality of conditions of land use approvals. The answer is the latter — pre-1999 law similarly required claimants to raise the issue of the validity of the conditions and pursue the matter through the available local appeal and LUBA processes.

In *Dunn v. City of Redmond*, 303 Or 201, 209, 735 P2d 609 (1987), this Court concluded that under then-existing law LUBA has exclusive jurisdiction to determine whether a land use decision should be remanded or set aside on constitutional grounds, while the circuit courts have jurisdiction over claims that the government's actions in imposing the conditions entitle the owner to compensation. The Court explained:

> If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has the opportunity to reconsider and modify its decision. 303 Or at 209.

In *Dunn*, the precise issue before the Court was whether the Oregon Court of Appeals erred when it held that LUBA lacked jurisdiction to rule on the constitutionality of the challenged land use regulations. The Court was not called upon to revisit whether a person who wished to seek compensation for allegedly unconstitutional conditions of a land use approval was required first to pursue administrative and appellate review of the validity of the conditions. The whole point of *Dunn* was that the petitioner was seeking to obtain administrative relief from the

challenged regulations in the first instance and was denied that opportunity by the Court of Appeals. *Dunn*, however, provides the answer to the first step of the analysis: a person who claims that a condition of approval is unconstitutional must first seek relief from that condition through LUBA.

In *Suess Builders v. City of Beaverton*, 294 Or 254, 261-62, 656 P2d 306 (1982), this Court held that a plaintiff seeking compensation on the ground that local land use regulations effected a taking of its property was required to pursue available administrative procedures for seeking relief. The Court held that there was no basis to distinguish the claim for compensation before it from the claim for declaratory relief it had held subject to exhaustion in *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 623, 581 P.2d 50 (1978). *Suess Builders*, 294 Or at 261-62. *Suess Builders* and *Fifth Avenue* thus teach that an administrative appeal is a necessary predicate to a claim for damages.

The procedural posture of *Suess Builders* and *Fifth Avenue* is slightly different from the procedural posture here. In *Suess Builders* and in *Fifth Avenue*, the property owner, *at any time*, could have sought an exception to the challenged regulations. Here, the plaintiff's development approval was subject to conditions of approval. Plaintiff, in order to obtain relief from them, was required to file a timely appeal to the City Council and then the LUBA. West Linn Community Development Code 99.240(A) and ORS 197.830. Once the time passes for a LUBA appeal, is a plaintiff's claim barred by failure to pursue administrative remedies? Or is the administrative relief no longer "available," so that the plaintiff could now bring a damage claim without ever having to seek any administrative relief at all?

In *Miller v. Schrunk et al*, 232 Or 383, 375 P2d 823 (1962), this Court denied relief where the petitioner consciously declined to seek available administrative review. The Court held: "When any charter or statute sets out a procedure whereby an administrative agency must review its own prior determination, that procedure must be followed. Judicial review is only available after the procedure for relief within the administrative body itself has been followed without success." *Id.* at 388. It follows, then, that, if plaintiff here *ever* had *any* available review within the City of West Linn (*e.g.*, an appeal of the conditions to the Planning Commission and the City Council), and failed to avail itself of that review, its inverse condemnation claim would be barred for failure to pursue available administrative remedies.

What happens if the plaintiff, as the plaintiff here appears to have done, acquiesces in or affirmatively embraces the local government's conditions of approval before the final local decision maker, and does not seek review of the allegedly offending conditions administratively and before LUBA? In other words, when the local decision maker relies on plaintiff's failure to pursue administrative remedies as well as on plaintiff's actions indicating affirmative agreement with the conditions of approval, and plaintiff, thereby, is able to realize the benefits that accrue from the City's approval and from compliance with the City's conditions, can the plaintiff, at the same time, bring an action seeking damages on the theory that compliance with those conditions effected a taking of the plaintiff's property?

There is controlling precedent in the courts of this State estopping recovery when a party accepts the benefits derived by the same governmental action the party later seeks to challenge. In *State v. Justrom Fish Co,* 149 Or. 362, 39 P.2d 355

(1934), defendant executed a bond guaranteeing payment of a poundage tax on fish in exchange for a dealer's license to sell fish. After two years of selling fish and in response to a compliant seeking to recover the tax, the defendant claimed the statute providing for the tax was unconstitutional. The court found that when the state was induced to issue a license by reason of the bond and whereby the principal enjoys the benefits it was intended to secure, the parties are estopped from challenging the validity of the underlying obligation. *Id.* at 130.

In *LA Development v. City of Sherwood,* 159 Or. App. 125, 977 P.2d 392, (1999), the Oregon Court of Appeals applied these principles of estoppel to a plaintiff who failed to pursue its administrative remedies at LUBA and proceeded to complete the developments in compliance with the conditions and sold the lots making a profit. *Id.* at 127. Just as in *Jutstrom Fish Company,* the court held that the developer was estopped from denying the effect of the legal benefits that it had procured when it benefited from the city's approval by refraining from pursuing its rights under ORS Chapter 197, appealing the decision to LUBA. The Ninth Circuit has come to a similar conclusion. *McClung v. City of Sumner* 548 F3d 1219 (9th Cir. 2008).

Miller v. Schrunk involved only the failure to pursue all available administrative relief within the agency itself. LUBA provides administrative review by the State of decisions made by local governments. Does the circumstance that administrative review is available through a State agency rather than through the local decision maker relieve a plaintiff of what otherwise would be a requirement to pursue an administrative appeal as a precondition to filing a suit for damages?

To answer that question, we come full circle by returning to *Dunn v. City of Redmond*, where this Court recognized LUBA's exclusive jurisdiction to review local land use decisions. Under *Dunn*, the property owner must first challenge the condition at LUBA. If LUBA decides the condition is an unconstitutional taking, the government is entitled to the opportunity to change its mind about imposing the condition before it is subject to suit for damages. 303 Or at 209.

> An owner's unilateral choice of remedy is not conclusive. Constitutional challenges to regulation of private property arise when the government has decided *not* to take the property for public use and does not intend to pay compensation. The government may be prepared to defend its regulation whether the owner sues to invalidate it or sues for compensation, but if the decision proves to be adverse, the government may prefer to modify or abandon its policy rather than buy the property. *When the government has sought to regulate private property but not to take it, the owner cannot force a sale by having a court decide that the regulation is tantamount to taking the property for a public use.* The policy choice is for the government to make. *Id.* at 205. (Emphasis added).

With exceptions not relevant here, the Legislature has given LUBA "exclusive jurisdiction to review any land use decision or limited land use decision of a local government." ORS 197.825(1). That exclusive jurisdiction expressly includes the authority to set aside an unconstitutional land use decision. ORS 197.835(9)(a)(E).[3] Consonant with this Court's long-standing fidelity to the doctrine of exhaustion of remedies, confirmed by the Legislature through the enactment of ORS 197.796, the answer to the first question posed by the United States Court of Appeals for the Ninth Circuit is that a landowner who alleges that a condition of development amounts to an exaction or physical taking must pursue available local remedies before bringing a

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[3] ORS 197.796 now gives an applicant the alternative of going to circuit court for damages, so long as available local remedies are pursued.

claim of inverse condemnation in an Oregon state court, and that exhaustion requirement includes an appeal to LUBA.

Question 2: Can a condition of development that requires a landowner to develop off-site public property in which the landowner has no property interest constitute an exaction for which a Fifth Amendment remedy is available?

The short answer is "no." An obligation to develop off-site improvements on public property does not require any dedication or other transfer of real property and therefore, does not constitute an exaction[4] subject to heightened scrutiny under *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

A. The Ninth Circuit properly granted certification.

WLCP claims that this Court should not even address the second question certified from the Ninth Circuit Court of Appeals because *Clark v. City of Albany*, 137 Or App 293 (1995) fully answers the question and has not been expressly overturned. *WLCP* dismisses as "pure dictum" the Court of Appeals' more recent language in *Dudek v. Umatilla County*, 187 Or App 504 (2003) questioning the viability of *Clark*. This may be true as far as it goes, but as the Ninth Circuit correctly explained in *WLCP* below, the holding in *Clark* is an open question in light of more recent cases from the United States Supreme Court, as the Oregon Court of Appeals itself acknowledged in *Dudek*. *West Linn Corporate Park v. City of West Linn*, 534 F. 3d

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[4] Use of the phrase "exaction" as it relates to takings has caused some confusion and it does not help that WLCP conflates all three terms – "physical taking," "regulatory taking" and "exaction" into one. The Ninth Circuit, citing to *Dolan*, stated that "exactions" are generally synonymous with "physical takings." *West Linn Corporate Park v. City of West Linn*, 524 F. 3d 1091, 1100 n.4 (9th Cir. 2008). *Dolan* does not make that identification. In any event, focusing on whether something constitutes an "exaction" is a semantical red herring. Neither the Federal nor Oregon Constitutions speak in terms of exactions. The proper inquiry under the two takings clauses are whether a governmental action results in the taking of (real) private property for public use, for which just compensation must be paid.

1091, 1103 (9th Cir. 2008). Moreover, it is this court to which the Ninth Circuit certified these questions and it is this court which elected to respond to them in accordance with its own case law.

In 1995, when *Clark* was decided, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) was just one year old. Few, if any, cases had been decided clarifying the reach of the *Dolan* holding. The passage of 15 years has allowed additional Supreme Court clarification establishing that obligations to construct off-site improvements are not exactions, and the court in *Clark* got it wrong. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546-47 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999). In fact, the Court of Appeals – through Judge Deits who also wrote the opinion in the *Clark* decision – explained that the "holding in *Clark v. City of Albany* is open to question following the Supreme Court's decision[in *City of Monterey*.]" *Dudek v. Umatilla County*, 187 Or App 504, 516 n. 10 (2003).

That the Court of Appeals questions the viability of its own ruling is a strong indication that the issue is not settled in Oregon under the precedents of this court. As such, the core issue of whether a required off-site improvement constitutes an exaction is unresolved, and it is proper for this Court to address it.

B. A condition of approval imposed by a local government that a developer construct an off-site improvement does not constitute an exaction for purposes of the Fifth Amendment.

In responding to the second certified question, WLCP relies almost entirely on a single decision from the Oregon Court of Appeals – *Clark v. City of Albany*, 137 Or App 293 (1995). As mentioned, however, the viability of *Clark* in doubt. A more accurate reading of *Dolan* and its progeny establish that a requirement that a

developer provide off-site improvements is not subject to heightened scrutiny under *Dolan* in a challenge under the takings clause of the Federal Constitution, and is not a taking at all under the Oregon Constitution.

Conditions of approval are planning tools used by local governments to mitigate and offset negative impacts resulting from proposed development. State and local governments have full authority to engage in land use planning. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). If a developer intends to use real property in a more intensive manner or in a way that will generate additional offsite impacts as authorized by local legislative enactment, it is appropriate that the developer be required to mitigate those negative aspects of its development. This is often accomplished by requiring the enlargement of utility pipes or increased transportation capacity.

However, public agency authorization to impose conditions of approval is not unlimited. Both the Oregon and Federal Constitutions provide protection to property owners from takings. Oregon Constitution, Article 1, Section 18 provides:

> 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.

The Fifth Amendment to the United States Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

Under the first-things-first doctrine, Oregon courts must address the Oregon Constitution before addressing issues under the Federal Constitution. *Sterling v. Cupp*, 290 Or 611, 614 (1981) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim."); *State v. Scharf*, 288 Or 451, 454-55 (1980) ("Before addressing such federal issues, however, a court's responsibility is first to decide the effect of the state's own laws[.]"); *Freedom Socialist Party v. Bradbury*, 182 Or App 217, 231 (2002) (J. Landau concurring) ("Regardless of what the parties argue, we cannot reach federal constitutional issues until we have determined that the state constitution is not dispositive"). Although the first-things-first doctrine is well-settled, Oregon courts have not always adhered to it faithfully. *See, e.g.*, *Freedom Socialist Party*, 182 Or App at 230 (J. Landau concurring). For the benefit of the bench, the bar, as well as WLCP, this Court should take this opportunity once again to affirm the continuing viability of the first-things-first doctrine.[5]

Applied to the fact of this case, the Oregon Constitution does not provide relief to WLCP. Under Article 1, Section 18, an owner is entitled to compensation for inverse condemnation only if (1) the regulation deprives the owner of "all economically feasible private uses" or (2) the regulation "results in such governmental intrusion as to inflict virtually irreversible damage." *Suess Builders Company v. City of Beaverton*, 294 Or 254, 257-58 (1982) (citing *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 614 (1978)); *see also Coast Range Conifers, LLC*

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[5] This is especially true given that the prohibition contained in the Fifth Amendment is not merely on takings but on takings without just compensation which, in turn, requires review by a state court.

v. Board of Forestry, 339 Or 136 (2005). Because WLCP does not claim that it was deprived of "all economically feasible" uses or that the approval conditions resulted in an "intrusion" inflicting "virtually irreversible damage," WLCP is not entitled to relief under Article 1, Section 18 of the Oregon Constitution. To the contrary, the realized profit for the sale of the WCLP property after completion of all improvements, including all obligations required by the City, was $582,447. Defendants' ER-218.

Nor is WLCP entitled to relief under the Federal Constitution. *Dolan* provides a framework for analyzing certain takings claims under the Fifth Amendment. The holding of *Dolan* requires "rough proportionality" between real property dedications imposed as conditions of development with the impact of the development. *See Dolan*, 512 U.S. at 391. The Supreme Court and courts subsequently have labeled these obligations as exactions subject to the Fifth Amendment.

There are two important limitations to the Court's holding in *Dolan.* First, it is limited to cases where the City requires a dedication of land. The court found "the conditions imposed were not simply a limitation on the use petitioner might make of her parcel, but a requirement that deed portions of the property to the city." *Dolan,* 512 U.S. at 385. Second, the dedication was requires as part of an *ad hoc* process, not pursuant to an ordinance spelling out what would be required. *Id.* No United States Supreme Court decision has extended the *Dolan* analysis beyond possessory interests in real property. Instead, in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), it expressly declined to do so.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court explained why the lower court did not err by not including the

Dolan test in its instructions to the jury: "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions--land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702. The Court unambiguously has limited "exactions" to those situations where real property dedication is required and the dedicatory obligation may go so far as to violate the takings clause.

More recently, in *Lingle v. Chevron U.S.A.*, 544 U.S. at 546, the Court reiterated that both *Dolan* and its predecessor *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), "involved Fifth Amendment taking challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." Neither case dealt with obligations to pay money, nor to those that required the offering of services to construct off-site improvements. As the Court explained, "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." 544 U.S. at 547.

In another case, the United States Supreme Court addressed – without reaching consensus – whether a monetary claim can constitute a taking under the Fifth Amendment. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the issue was whether a federal statute that made mining companies liable for health care benefits to their former employees, even where there was no other contractual or other regulatory duty to do so. The Supreme Court struck down the statute, but there was no majority opinion as to the rationale. Four Justices found the legislation effected a "taking" and

was thus unconstitutional. Four other Justices analyzed the legislation under substantive due process standards, but would uphold the same. Justice Kennedy was the "swing vote," concurring in the judgment striking down the statute, but dissenting from the reasoning of the four justices finding the legislation unconstitutional.

Justice Kennedy found the Act violated substantive due process, but not the takings clause, because it did not affect an identifiable property interest. Rather, the Act only created a monetary liability, which does not cause a taking. "To call this sort of governmental action a takings as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise." *Id.* at 540 (J. Kennedy concurring in judgment and dissenting in part). Justice Kennedy emphasized that previous takings cases all involved specifically identifiable real property. He cautioned against extending the takings analysis too far, lest all governmental action be subject to its prohibitions with attendant potential for monetary damages, especially by giving insufficient consideration to the alleged "property right" being scrutinized. *Id.* at 540-47.

Justice Breyer wrote a dissent and was joined by four other justices concluding that the obligation to pay money to third parties does not fall under the takings clause as its scope is limited to physical or intellectual property obligations conveyed to the government. These questions, according to Justice Breyer, are better decided under the due process clause, which safeguards citizens from arbitrary or irrational legislation. Whether or not the federal due process clause applies is not a question before the court in this case. However, it could provide a framework for determining

whether a local government regulation to construct off-site improvements goes too far.

Although this is the first time Oregon courts have been asked this question head on, they have repeatedly acknowledged that *Clark* is open to question in light of more recent United States Supreme Court case law. For example, in *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 395 n. 14 (2002), the Oregon Court of Appeals examined whether a legislatively enacted impact fee can constitute an exaction subject to *Dolan*. The court of appeals ultimately held that the impact fee was not a *Dolan* exaction. In explaining its rationale, and the continuing effect (if any) of *Clark*, the court explained:

> A few years after we decided *Clark*, the Supreme Court issued its decision in [*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999)], which involved a development denial, rather than a permit conditioned on either a monetary exaction or dedication of property. In its opinion, the Court refused to subject the denial to *Dolan*'s heightened scrutiny test, cautioning that it had not 'extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land use decisions conditioning approval of development on the *dedication of property to public use*.' 526 U.S. at 701, 119 S. Ct. 1624 (emphasis added). Other courts have noted the Court's comment and, because of it, have either declined or expressed reluctance to apply *Dolan* ' s analysis to exactions that do not involve property dedications. See, e.g., [*Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995)]; [*Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001)]. This is not an appropriate case to reexamine *Clark* in light of *City of Monterey* or other later jurisprudential developments because this case can be resolved on the more narrow ground of whether *Dolan* correctly extends to generally applicable legislatively imposed development fees. *Rogers Machinery, Inc*, 181 Or App at 395 n.14.

The Oregon Court of Appeals again questioned whether *Clark* remained good law in *Dudek v. Umatilla County*, 187 Or App 504 (2003). In *Dudek*, the court held that a condition requiring a dedicated public easement was subject to the *Dolan*

analysis. Because *Dudek* did not involve a purely monetary exaction or a requirement to make off-site improvements, it too was not an appropriate case to re-examine *Clark*. The court, however, did explain that:

> As we noted in *Rogers Machinery, Inc.*, 181 Or.App. at 394-95 n. 14, 45 P.3d 966, our holding in *Clark v. City of Albany*, 142 Or.App. 207, 921 P.2d 406 (1996) [sic], 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 *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999). 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." 526 U.S. at 702, 119 S. Ct. 1624. The recent federal decisions cited, 187 Or.App. at 515 nn. 8, 9, 69 P.3d at 515 nn. 8, 9, 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*, 187 Or App at 516 n. 10.

Although WLCP summarily dismisses it as dictum, *Dudek* is a clear indication that the Court of Appeals believed that *Clark* is open to re-examination in light of *Del Monte Dunes* and *Eastern Enterprises*. If the relevant portion of *Clark* is no longer an adequate statement of the law, this Court of Appeals decision is certainly reviewable under the applicable takings precedents of this court. *Amici* assume the Ninth Circuit did not undertake a vain act in certifying these questions to this court assuming instead that *Clark* was unassailable.

Limiting Fifth Amendment "rough proportionality" obligations to those situations where dedication of real property is required by the local government is entirely consistent with the Supreme Court's policy analysis set out in *Dolan* and *Nollan*. In *Nollan*, the Supreme Court applied the idea of a Fifth Amendment exaction only to the required dedication that interferes with a core possessory interest

that is unique to real property. As the Court in *Dolan* explained, the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)]." *Dolan*, 512 U.S. at 393. Taking that right – one of the "most essential sticks in the bundle" – is what particularly troubled the Court:

> Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated. *Id.* at 394.

As explained in *Del Monte Dunes*, the Court has never extended the *Dolan* analysis to the required dedication of a less substantial property interest, such as money or required off-site improvements. Here, WLCP faced no conditioned obligations requiring that it dedicate real property to the public thereby denying its right to choose who may enter its property. As such, the conditions imposed in the WLCP case do not trigger the same policy considerations, nor do they require the Fifth Amendment protections guaranteed to real property.

WLCP suggests that, if given the chance, the Supreme Court would extend *Dolan* to **personal** property (like purely monetary requirements) because the Court in *Del Monte Dunes* used the word "property" without expressly limiting it to "real property" in its characterization of *Nollan* and *Dolan.* This strained reading is not consistent with the *Del Monte* Court's analysis and discussion. In using the word "property" in *Del Monte Dunes*, the Court was characterizing its Fifth Amendment takings precedent in *Nollan* and *Dolan*. As noted, both *Nollan* and *Dolan* involved the taking of a possessory interest in real property. In fact, both cases involved the taking of the most central and fundamental of the bundle of sticks – the right to

exclude. In that light, the Court's use of the phrase "property" in *Del Monte Dunes* clearly refers to the taking of a possessory interest in real property, as was the case in *Nollan* and *Dolan*.

Indeed, courts have recognized that the takings clause is much less protective, and more deference is given to the public interest served, when a government imposes a regulation without taking a real property interest. *See Rogers Machinery v. Washington County*, 181 Or App 369 (2002) (declining to extend *Dolan* to traffic impact fees requiring no dedication of real property).

Other jurisdictions have declared that *Dolan* is limited to dedications of possessory interests, and does not extend to purely monetary losses. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert den.* 504 U.S. 931 (1992) (declining to extend *Nollan* to purely monetary exactions); *Clajon Prod. Corp. v. Petera* 70 F.3d 1566, 1578 (10th Cir. 1995) (declining to apply *Dolan* to fees imposed as conditions for right to hunt on land because no physical invasion was involved); *McCarthy v. Leawood*, 257 Kan 566 (1995) (holding that *Dolan* does not extend beyond real property dedications to monetary fees).

In addition, *Nelson* (a 55-foot drainage easement), *Dolan* (a bike-pedestrian path), *Nolan* (a beach access easement), and *Dudek* (purchase of an easement and subsequent conveyance to the local government) all involved the conveyance of a real property right. These cases are all different from the present case. WLCP's conditions simply do not trigger the same policy concerns identified in *Dolan* and its progeny.

WLCP's case relies entirely on what it claims is the *ad hoc* nature of the adjudicative process, something that the *Dolan* court acknowledged only when concurrent with a real property dedication. In the *Eastern Enterprises* opinion Justice Kennedy said, "the degree of retroactive effect is a significant determinant in the constitutionality of a statue" because if "retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are very objects of the property ownership" and impair "both stability of investment and confidence in the constitutional system." *Eastern Enterprises* at 502.[6]

Given that no real property interest is at issue, WLCP is left to claim that merely the adjudicative nature of this decision alone requires application of "rough proportionality." Assuming *arguendo* that "rough proportionality" could apply to an adjudicative decision requiring off-site improvements, this is not a case where the individualized determination that did not become final until after the decision was made worked to prejudice the Petitioner in the same way that the Court was concerned about in *Dolan* and *Eastern Enterprises.* WLCP was made aware of the transportation and water system impacts and that the proposal would trigger the need for improvements during a preapplication conference before a design review

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[6] The O'Connor opinion also emphasizes a retroactive element:

> [Government] may impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practical necessities of producing ...legislation,'[but] our decisions have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. *Eastern Enterprises* at 528.

application was filed. (Def. Ser-203 to SER-207 and SER 393; Plaintiff's SER-0046). The initial decision to approve the application including conditions was appealed by others and defended by WLCP's predecessor-in-interest. (Defendants' ER-62). If it is possible to require off-site improvements through conditions that exact a taking under the Fifth Amendment due to the retroactive and individual nature of the requirements, now is not the time given that the contours of these improvement requirements were well known.

The force of WLCP's analysis also effectively eliminates the distinction between off-site and on-site improvements required in connection with a development. Focusing exclusively on an alleged "taking" of personal property by the improvement requirements would potentially open the floodgates of *Dolan* takings litigation at least with respect to all discretionary construction requirements.

Dolan cannot be a tool developers use whenever they are not completely satisfied with the land use process and decide to sue well after completion of construction as a bargaining chip to extort after-the-fact monetary or other concessions from public authorities. *Dolan* has limitations. It is grounded in the U.S. Constitution, which protects "private property" from being "taken for public use." Subsequent Supreme Court decisions have explained that *Dolan* has never been extended beyond obligations to relinquish some form of ownership to real property interests. WLCP relies almost exclusively on one Oregon Court of Appeals decision, which may no longer be good law. In short, WLCP's argument flies in the face of most relevant authority.

Because requirements to make off-site improvements do not trigger a *Dolan* analysis, the second certified question must be answered in the negative.

VI. CONCLUSION

A landowner, who alleges that a condition of development amounts to a Fifth Amendment taking, must present a ripe case and use all available local remedies before bringing that claim in an Oregon state court. Oregon law required an appeal to LUBA to review the condition. Only then could a circuit court award damages. An obligation to develop off-site improvements on public property does not require any "dedication of property" and, therefore, does not constitute an exaction subject to heightened scrutiny under *Dolan v. City of Tigard*, as a matter of federal law. A landowner may pursue any federal constitutional challenge to conditions of a land use approval through the processes provided by the State of Oregon, but the result of those challenges should be the same as it would be if decided by the federal courts.

DATED this 8th day of May, 2009.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original and twenty (20) copies of the enclosed BRIEF *AMICUS CURIAE* FOR THE AMERICAN PLANNING ASSOCIATION, THE OREGON CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND THE LEAGUE OF OREGON CITIES IN SUPPORT OF DEFENDANT-APPELLANT CITY OF WEST LINN with the:

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by first-class mail, postage prepaid. On the same date, I served two copies by first-class mail, postage prepaid, on the following parties:

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