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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

NIKE, INC.,)
)
Petitioner,)
)
vs.) LUBA No. 98-020
)
CITY OF BEAVERTON,) FINAL OPINION
) AND ORDER
Respondent.)

Appeal from City of Beaverton.

Joseph S. Voboril, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Tonkon Torp LLP.

Ted R. Naemura, Beaverton, filed the response brief. Mark E. Pilliod, Beaverton, argued on behalf of respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 08/19/98

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a legislative decision amending the
4 city's comprehensive plan to provide for pedestrian and public
5 street access to a light rail station.

6 **FACTS**

7 Petitioner owns 64 acres of vacant land within a 123-acre
8 area designated the Beaverton Creek Station Community District
9 (district) that is centered around a light rail station. The
10 district is bordered on the north by Jenkins Road and on the
11 east by Murray Blvd.

12 The city conducted a lengthy planning process, one focus
13 of which was how to plan for public access to the light rail
14 station. On January 6, 1998, the city council adopted the
15 challenged ordinance, which in relevant part amends the
16 comprehensive plan text to state:

17 "The following policies apply specifically to the
18 Beaverton Creek Station Community District.

19 * * * * *

20 "2. Transportation and Pedestrian Circulation

21 "a) Provide for public access to the LRT
22 Station platform from and across Murray
23 Boulevard to the Tektronix Campus * * *.
24 Provide for public access to the LRT
25 Station platform from and across Jenkins
26 Road to NIKE World Headquarters * * *.
27 Access for pedestrians from Jenkins Road
28 to the LRT Station platform shall be
29 direct to achieve a clear line of sight
30 and the shortest walking distance.
31 Required access is shown on Figure 2.

1 "b) Major Pedestrian Routes are shown on
2 Figure 3." Record 35-36.

3 Figure 2 is a map of the district with arrows drawn from
4 Jenkins Road and Murray Blvd. toward the station, indicating
5 the approximate locations of required public streets. Figure
6 3 is a similar map, with arrows drawn from Jenkins Road and
7 Murray Blvd. toward the station, indicating the approximate
8 locations of required pedestrian access.

9 Petitioner appeals the adoption of the comprehensive plan
10 amendment.

11 **MOTION TO STRIKE**

12 The city moves to strike portions of petitioner's oral
13 argument that, according to the city, articulate a different
14 basis on which the challenged decision should be remanded than
15 the theory presented in the petition for review. According to
16 the city, the petition for review argues that the challenged
17 decision effects an unconstitutional taking of property
18 without compensation, based on reference to two federal cases,
19 Dolan v. City of Tigard, 512 US 374, 114 S Ct 2309 (1994) and
20 Nollan v. California Coastal Commission, 483 US 825, 107 S Ct
21 3141 (1987). As described more fully below, the theory of
22 takings articulated in the petition for review as we
23 understand it is that the challenged decision requires
24 petitioner to dedicate roads to the city in order to obtain
25 approval of future development proposals, without any
26 provision ensuring that these future exactions will be
27 reasonably related or roughly proportional to the impact of

1 any development petitioner might propose for the subject
2 property.

3 The city contends that the argument and authority stated
4 in the petition for review suggest an "as applied" regulatory
5 takings theory rather than a facial challenge to the decision
6 based on physical invasion of petitioner's property.
7 Accordingly, the city devotes much of its response brief to
8 analyzing why petitioner's takings claim fails the
9 requirements for an "as applied" regulatory takings claim,
10 arguing in particular that petitioner's takings claim is not
11 ripe because the petitioner has not proposed any future
12 development and the city has not applied the challenged
13 decision to petitioner's property. The city now moves to
14 strike petitioner's oral argument or, alternatively, allow the
15 city supplemental briefing, because the theory that petitioner
16 raised and relied upon at oral argument, a facial challenge to
17 the decision based on a theory of physical invasion, is not
18 found in either parties' brief. The city notes that both the
19 takings cases cited in the petition for review are "as
20 applied" rather than facial challenges, and that the petition
21 for review never mentions "physical invasion" as a theory or
22 analytical framework. Further, the city notes, the response
23 brief mentions only in passing the distinctions between facial
24 and "as applied" challenges and regulatory and physical
25 invasion types of takings.

1 At oral argument, petitioner addressed the city's
2 ripeness defense by arguing that the takings claim in the
3 petition for review is not based on an "as applied" regulatory
4 takings theory, but rather is a facial challenge to the
5 decision premised on petitioner's view that the challenged
6 decision effects or is certain to effect a "physical invasion"
7 of petitioner's property.

8 In reply to the city's motion to strike, petitioner
9 reiterates that its theory throughout this proceeding has been
10 that the challenged decision is facially unconstitutional
11 because by its terms when it is ultimately applied to
12 petitioner's property during future development review it will
13 result in an unconstitutional exaction, a physical taking, of
14 petitioner's property. Petitioner contends that the city
15 erroneously characterized its claim as an "as applied,"
16 regulatory takings-type of claim, and that it merely corrected
17 that mischaracterization at oral argument without raising a
18 new issue or theory.

19 The takings theory stated in the petition for review is
20 nonspecific. The city concedes, however, that a facial
21 challenge alleging physical invasion could be inferred from
22 the petition for review, and that petitioner was entitled to
23 reply to the city's ripeness defense, either in a reply brief
24 or at oral argument. Petitioner's response to the city's
25 ripeness defense was, essentially, to dispute the city's
26 characterization of its theory and to assert that the theory

1 propounded at oral argument, which it contends is not subject
2 to a ripeness defense, is substantially the same as the theory
3 set forth in its petition for review.

4 LUBA generally does not consider arguments or issues
5 raised for the first time at oral argument. DLCD v. Douglas
6 County, 28 Or LUBA 242, 252 (1994) (argument that county's
7 Farm/Forest district is inconsistent with administrative rules
8 is different than the argument in the petition for review that
9 county's Exclusive Farm Use districts are inconsistent);
10 Bouman v. Jackson County, 23 Or LUBA 628, 656 (1992)
11 (evidentiary challenge regarding water quantity raises a
12 different issue than legal challenge in the petition for
13 review regarding ability to obtain water permit); Ward v. City
14 of Lake Oswego, 21 Or LUBA 470, 481-82 (1991) (argument that
15 city misinterpreted its code to require that lot be legally
16 created is different than the argument in the petition for
17 review that the lot had been legally created).

18 In our view, the present case is distinguishable from
19 DLCD v. Douglas County, Bouman and Ward. The differences
20 cited by the city in this case are not so much between the
21 arguments made in the petition for review and in oral
22 argument, but rather between the parties' understanding of
23 petitioner's theory and argument. While the argument in the
24 petition for review is not particularly well-developed, and
25 that lack of development may have led the city to adopt an
26 unfortunate analytical stance in its response, the arguments

1 in the petition for review are consistent with and not
2 fundamentally different than those made in oral argument. The
3 differences are mostly a matter of labeling (or lack thereof)
4 rather than substance.

5 For the foregoing reasons, we deny the city's motion to
6 strike portions of petitioner's oral argument. For the same
7 reasons, we deny the city's alternative motion to allow
8 supplemental response briefs.

9 **ASSIGNMENT OF ERROR**

10 Petitioner argues that the transportation and pedestrian
11 circulation policy adopted in the challenged decision,
12 together with Figures 2 and 3 (the public access policy),
13 violate petitioner's property rights protected by Article I,
14 section 18 of the Oregon Constitution and the Fifth and
15 Fourteenth Amendments of the United States Constitution,
16 because the policy constitutes a taking of private property
17 without compensation. In addition, petitioner argues that the
18 findings adopted to support the decision contradict and do not
19 support the decision.

20 Petitioner's takings argument is premised on its
21 understanding that the challenged decision will require
22 petitioner to provide the public streets and pedestrian access
23 described in the public access policy. Petitioner argues
24 that, prior to submitting any future development plan for its
25 property, it will be required to submit a design or master
26 plan providing the required public access. Petitioner

1 contends that these mandatory requirements will be imposed
2 regardless of the nature and extent of any future development
3 proposal. Accordingly, petitioner concludes, the public
4 access requirements do not meet the standard for exactions
5 articulated in Dolan and Nollan, which requires that a
6 government may only impose exactions that are related to and
7 "roughly proportional" to the projected impact of the proposed
8 development.

9 Petitioner acknowledges that it has no pending
10 development proposal, and that the city has not attempted to
11 apply the public access policy or otherwise attempted to take
12 petitioner's property with or without just compensation.
13 Petitioner also acknowledges that the challenged decision
14 explains that

15 "[t]he provision of these public roads and major
16 pedestrian routes [in Figures 2 and 3] will be
17 examined at the time of review and approval for
18 development applications. These improvements, or
19 some portions of these improvements, may be required
20 as a condition of development depending upon the
21 projected impact of the development and its
22 relationship to these improvements." Record 56.

23 Similarly, the challenged decision explains that

24 "[i]t is the city's position that such access be
25 public and that the plan should so indicate the
26 city's intent to provide future developers with
27 notice of the desired future streets or other access
28 on the property. However, the issue as to how and
29 at what time such access will be provided, whether
30 through the Capital Improvement Program, Federal or
31 state transportation programs, or as a development
32 exaction based on an analysis of the projected
33 impact of a specific development, or some other

1 method, will be determined at the time of the
2 development review." Record 61.

3 However, petitioner argues that these statements do not
4 insulate the city from the unconstitutional effect of the
5 public access policy, which appears to mandate public access
6 regardless of the circumstances. According to petitioner, the
7 statements conflict with the public access policy because they
8 acknowledge the prohibition on the taking of property without
9 just compensation imposed by the federal and state
10 constitutions, while the actual public access policy does not.
11 Thus, petitioner contends that the city's decision is not
12 supported by its "findings,"¹ and that the public access
13 policy must be "eliminated or modified so that they are
14 consistent with the findings adopted by the City Council."
15 Petition for Review 17.

16 The city responds, as a preliminary matter, that
17 petitioner has not developed any argument under the state
18 constitution why the challenged decision effects an unlawful
19 taking of petitioner's property, nor developed any similar
20 argument under the federal constitution other than a theory of
21 unconstitutional exaction based on the Dolan and Nollan cases.
22 We agree with the city that the petition for review presents
23 no argument or authority, other than under Dolan and Nollan,
24 why the city's decision is unconstitutional.

¹As noted below, we question whether the quoted statements from the challenged decision are accurately characterized as findings.

1 With respect to petitioner's theory of unconstitutional
2 exactions under Dolan and Nollan, the city responds that
3 petitioner's claim is not ripe for review. According to the
4 city, the challenged public access policy simply plans for
5 future public streets and pedestrian access, without
6 determining the exact location of that access, nor the
7 circumstances under which they will become public, that is,
8 whether the city will purchase easements or condemn the land
9 underlying the streets and access, or require dedication of
10 some or all of the public access as a condition of future
11 development. The city argues that, because there is no
12 pending development proposal before the city, and the city has
13 not otherwise attempted to apply the public access policy to
14 petitioner's property, the policy does not and cannot possibly
15 exact anything from petitioner or otherwise effect a takings
16 of petitioner's property. Accordingly, the city concludes
17 that petitioner's constitutional claim is not ripe for review.

18 The city's response is couched in terms derived from its
19 understanding that petitioner's takings claim is an "as
20 applied" regulatory takings claim, which is subject to a
21 ripeness defense. See Nelson v. City of Lake Oswego, 126 Or
22 App 416, 422, 869 P2d 350 (1994) (the ripeness analysis is
23 applicable to regulatory takings cases but not to takings
24 claims alleging public acquisition of private property through
25 an improper conditional exaction); Ferguson v. City of Mill
26 City, 120 Or App 210, 852 P2d 205 (1993) (holding, in a review

1 of a facial challenge to an ordinance requiring landowners to
2 grant a sewer easement without compensation, that the
3 ordinance is a permanent physical occupation of private
4 property and hence an unconstitutional taking). Nonetheless,
5 we agree with the city that petitioner's challenge under Dolan
6 is premature.

7 As we understand petitioner's theory, as amplified at
8 oral argument, petitioner argues that the challenged ordinance
9 will require a future exaction from petitioner, without
10 providing for the rough proportionality required by Dolan.
11 Petitioner cites to Ferguson for the proposition that, under
12 such circumstances, the affected landowner need not wait until
13 the city actually seeks to exact the land from the landowner,
14 but may pose a facial challenge to the ordinance authorizing
15 the exaction.

16 However, petitioner fails to appreciate the difference
17 between cases like Ferguson and the present one. In Ferguson,
18 the parties agreed that the ordinance required uncompensated
19 acquisition. 120 Or App at 212. In the present case, even if
20 the terms of the public access policy in this case require
21 public acquisition of part of petitioner's property (something
22 the city disputes), those terms do not require or even suggest
23 that the acquisition would be uncompensated. The public
24 access policy is silent as to whether access will ultimately
25 be purchased, acquired by eminent domain, or dedicated in
26 whole or part as a conditional exaction related and

1 proportioned to future development approvals. The
2 accompanying statements in the challenged decision suggest
3 that public access will not be required as an absolute
4 mandate, and express the city's understanding that the means
5 by which access will be provided remains to be determined.²

6 Petitioner has not cited any cases that find an
7 unconstitutional taking to have occurred merely because a
8 local government adopts an ordinance that plans for future
9 public acquisition of private property. The city cites to
10 Fifth Avenue Corp. v. Washington County, 282 Or 591, 614, 581
11 P2d 50 (1978) as contrary authority. In Fifth Avenue Corp.,
12 the Supreme Court held that even if planning or zoning
13 designates land for a future public use, a takings has not
14 occurred unless the designation precludes all economically
15 feasible use of the property pending eventual public
16 acquisition or results in current extensive governmental
17 intrusions such as trespass or nuisance. Id. Petitioner has
18 not suggested that either of the two exceptions stated in
19 Fifth Avenue Corp. apply in the present context.

20 Even if petitioner is correct that a local government's
21 plans for future, mandatory public acquisition can constitute
22 a taking, we do not understand how an unconstitutional taking

²The city suggests that the challenged decision interprets the public access policy as being nonmandatory and not requiring uncompensated acquisition. If so, the city argues, that interpretation is entitled to deference under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). Our resolution on different grounds makes it unnecessary to reach the merits of that argument.

1 could occur unless the ordinance also requires uncompensated
2 acquisition or acquisition that is facially and necessarily
3 unrelated or disproportional to any conceivable future
4 development proposal. Petitioner has not established that the
5 challenged decision requires the city to acquire property
6 without compensation or without relating or proportioning that
7 acquisition to any future development proposal. While
8 petitioner is not required to demonstrate in a facial takings
9 challenge that the takings issue is ripe for review, it must
10 demonstrate that the challenged ordinance takes property
11 without just compensation. Petitioner has not made that
12 demonstration.

13 With respect to petitioner's argument that the statements
14 in the challenged ordinance conflict with the public access
15 policy, we agree with the city that those statements and the
16 public access policy do not conflict or, even assuming they
17 do, that petitioner has not established why that conflict
18 provides a basis to reverse or remand the decision.
19 Petitioner cites to Art Piculell Group v. Clackamas County,
20 142 Or App 327, 331, 922 P2d 1227 (1996) for the proposition
21 that the local government must make findings demonstrating
22 rough proportionality between the exaction and the development
23 proposal. Petitioner also cites to cases setting forth
24 standards for adequate findings in quasi-judicial settings.

25 However, as the city points out, the challenged decision
26 is not a quasi-judicial decision concerned with a development

1 proposal or the need to determine rough proportionality, but
2 rather a legislative decision that need not be supported by
3 findings at all. In any case, the "findings" cited in this
4 case do not appear to be findings of compliance with
5 applicable approval criteria or even findings of fact, but
6 rather explanations of how the city contemplates the public
7 access policy will be applied in the future. We fail to see
8 how any conflict between such explanations and the public
9 access policy could provide a basis for reversal or remand of
10 the challenged decision.

11 The city's decision is affirmed.