

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

3
4 ROBERT McCLURE and SHARON McCLURE,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF SPRINGFIELD,
10 *Respondent.*

11
12 LUBA No. 2000-115

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Springfield.

18
19 David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of
20 petitioners.

21
22 Meg E. Kieran, Springfield, filed the response brief and argued on behalf of
23 respondent. With her on the brief were Joseph J. Leahy and Harold, Leahy and Kieran.

24
25 BRIGGS, Board Member; BASSHAM, Board Chair, participated in the decision.
26 HOLSTUN, Board Member, concurring.

27
28 REMANDED

01/19/2001

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

Petitioners challenge certain conditions that the city imposed in its limited land use decision approving a partition.

FACTS

This matter is before us for the second time. In our previous decision, *McClure v. City of Springfield*, 37 Or LUBA 759 (2000) (*McClure I*), we set out the facts as follows:

“The subject property is a 25,700-square foot parcel located in the city’s Low Density Residential (LDR) zone. A single-family dwelling is sited on the eastern portion of the property. The subject property is bordered on the east by 8th Street, a local street with a 45-foot right-of-way. It is bordered on the south by a 10-foot right-of-way for M Street. M Street is improved with an asphalt bicycle/pedestrian path. The area surrounding the subject property is fully developed with dwellings.

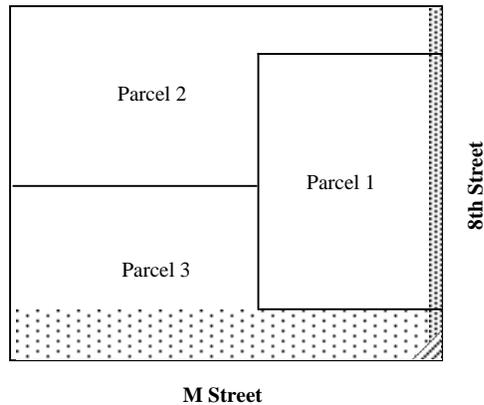
“Petitioners, the applicants below, propose to partition the subject property into three parcels. Parcel 1 fronts 8th Street, includes approximately 10,300 square feet, and contains the existing dwelling. Parcel 2 is a 7,700 square-foot parcel, with access to 8th Street via a 20-foot panhandle north of Parcel 1. Parcel 3 is a 7,700 square-foot parcel, with access to 8th Street via a 20-foot panhandle south of Parcel 1. The property could not be further divided under existing zoning.

“The city’s planning director approved the proposed partition with conditions. One condition requires that petitioners dedicate 20 feet of right-of-way on the south portion of the subject property to allow for the future development of M Street for both vehicular and bicycle travel. Another condition requires that petitioners dedicate a 10-foot by 10-foot area at the southeast corner of the subject property to ensure adequate sight visibility and turning radius for the M Street/8th Street intersection. The third condition requires that petitioners dedicate a 5-foot strip along the 8th Street frontage of the subject parcel to widen the 8th Street right-of-way to allow for the construction of a curbside sidewalk and street lighting. Finally, petitioners [were] required to improve the 8th Street frontage with sidewalks and street lighting.

“Petitioners challenged the conditions of approval to the city planning commission, arguing that the proposed conditions were excessive, unconstitutional exactions. The planning commission affirmed the planning director’s decision imposing the dedication and improvement requirements. However, the planning commission modified the fourth condition of approval to require that petitioners sign a development agreement to ensure future

1 sidewalk and street lighting improvements, rather than requiring the
2 immediate construction of the sidewalks and street lighting. The planning
3 commission adopted supplemental findings to support its decision.” 37 Or
4 LUBA at 762-63 (footnote omitted).

5 For ease of reference, below is a diagram of the proposed partition and the
6 dedications required by the city. This diagram is provided for illustrative purposes only and



KEY TO DEDICATIONS:

-  Right-of-way for future M Street development.
-  10 foot x 10 foot “clipped corner.”
-  Right-of-way for sidewalk/lighting.

7 is not to scale.

8 **A. The McClure I Decision**

9 In *McClure I*, we summarized the findings adopted by the planning commission to
10 support its decision as follows:

11 “1. The code requires the dedication of needed right-of-way ‘whenever an
12 existing street of inadequate width is abutting or within a development
13 area requiring Development Approval.’ Springfield Development
14 Code (SDC) 32.020(10)(a). [*McClure I*] Record 67.

15 “2. The proposed development will significantly increase vehicular,
16 bicycle and pedestrian traffic. [*McClure I*] Record 68.

17 “3. The property will benefit from the M Street improvements, sidewalks
18 and the 10-foot by 10-foot clipped corner. A duplex may be sited on
19 property located on a corner of two city streets. Thus, the property

1 owner of Parcel 1 will benefit from the required street dedications by
2 being able to place a duplex on that parcel. The owner of Parcel 3 will
3 benefit from having a street fronting the parcel, rather than having to
4 maintain the flag driveway to the main portion of the parcel. The
5 owner of Parcel 3 will also have better access for emergency vehicles,
6 and immediate access to a public street. [*McClure I*] Record 68.

7 “4. The increased traffic caused by the panhandle driveway for Parcel 3
8 presents a safety hazard. [*McClure I*] Record 69.

9 “5. The conditions of approval will have no significant impact on the
10 owners’ use of the property. [*McClure I*] Record 69.

11 “6. The proposed development is located in an ‘infill’ area and is the last
12 development of the property. [*McClure I*] Record 70.

13 “7. The appellants purchased the property subject to and with knowledge
14 of the public dedications and the improvements the city would require
15 prior to development of the property. [*McClure I*] Record 71.

16 “8. The area of the city where the subject property is located ‘lacks
17 sufficient east-west connectivity.’ Acquiring the needed right-of-way
18 for M Street will allow for the eventual vehicular connection between
19 the segment of M Street that currently terminates on the west side of
20 7th Street, and the segment of M Street that currently terminates on the
21 east side of 8th Street. In doing so, the residents of the area will have
22 better connections to local schools and emergency services. [*McClure*
23 *I*] Record 80-81.” 37 Or LUBA at 767-68.

24 In *McClure I*, we reviewed the city’s findings pursuant to our understanding of *Dolan*
25 *v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) (*Dolan*) and the
26 Oregon appellate cases interpreting it to determine whether the city improperly included
27 certain factors in its findings justifying its exactions. We concluded that the city could not
28 use exaction formulas contained in the city’s zoning code as a substitute for particularized
29 findings to establish that the impact of the proposed development on identified public
30 interests is roughly proportional to the exactions the city imposed. We also concluded that
31 the city’s determination that the burden of the exaction for the M Street right-of-way was
32 inconsequential because the area required to be dedicated for road right-of-way would
33 otherwise be used as a private access was not a proper consideration under *Dolan*. In

1 addition, we concluded that the mere fact that the proposed partition would result in infill
2 development was, in itself, insufficient to justify any exaction. Finally, we stated that neither
3 knowledge on the part of the applicants as to the exactions the city would require nor the
4 generalized community benefit realized by the exactions could be included in a *Dolan* rough
5 proportionality analysis.

6 We held that the city could consider the specific transportation impacts caused by the
7 proposed partition, and that those impacts could include impacts resulting from development
8 that could occur without further city approvals. We also held that benefits accruing to the
9 subject property as a result of the exactions and safety concerns that arose from approving
10 the development as proposed could also be considered in the rough proportionality analysis.

11 After setting out those factors that could be included in the city’s rough
12 proportionality analysis, we ultimately concluded that the findings the city adopted were
13 insufficient to support the exactions the city demanded. We then remanded the city’s
14 decision for further proceedings consistent with our analysis.

15 **B. Remand Proceedings Before the City**

16 On remand, the city planning director again approved the partition application,
17 subject to the same conditions of approval, readopting the original findings and adopting
18 supplemental findings to support the decision. Petitioners appealed that decision to the city
19 planning commission, which again modified the condition of approval requiring the sidewalk
20 improvement. Instead, the planning commission required that petitioners sign an
21 improvement agreement/waiver of remonstrance for those improvements. The planning
22 commission adopted all of the planning director’s findings, and also adopted supplemental
23 findings to support its decision.¹

¹The planning commission’s decision lists the conditions of approval as follows:

“7. Dedicate 20 feet of right-of-way along the southern property line of the development area for the eventual extension of M Street.

1 This appeal followed.

2 **C. Planning Commission Supplemental Findings**

3 In its remand proceedings, the planning commission adopted the following
4 supplemental findings:

5 “1. The assumption that the [n]ew development will produce 19 vehicle
6 trips per day is a valid measure of impacts because 19 trips per day is
7 one of the lowest volumes of traffic generated by two permitted uses
8 in the [LDR zone] (SDC 16.020).

9 “2. Conditions of approval #7, #8, #9 and #10 are directly proportional to
10 the impacts of the subject development on the local street system of
11 creating two new parcels as proposed by [petitioners]. This is because
12 the minimum 19 new trips per day the development will generate will
13 comprise 1.86 percent of the 1020 trips that directly and daily impact
14 the sections of local street serving the development area before
15 connecting to a minor arterial street. The 4,371 square feet of right-of-
16 way that is required to be dedicated comprises only 1.59 percent of the
17 276,700 square feet of planned right-of-way that the proposed
18 development will impact. Since the 1.59 percent right-of-way
19 dedication is a smaller fraction than the [1.86] percent of the vehicle
20 impacts that the new development will produce, the required
21 dedication is roughly proportional to the impacts of the development
22 and is, in fact, less tha[n] what the city could exact if a direct pro rata
23 dedication were required.

24 “3. The required 4,371 square foot right-of-way dedication is roughly
25 proportional to the impacts of creating two new developable lots in the

“8. Dedicate 5 feet of right-of-way along the full frontage of 8th Street to allow
sufficient right-of-way for the construction of a curbside sidewalk.

“9. Dedicate a 10 foot by 10 foot ‘clipped corner’ at the intersection of the M Street
dedication and the 8th Street right-of-way.

“10. Install a 5-foot curbside sidewalk, ADA-accessible driveway approaches for all 3
lots and street lighting.

“* * * * *

“* * * Condition #10 will be fulfilled by the recording of an Improvement Agreement for the
construction of curbside sidewalks on 8th Street. * * *” Record 3.

Both the planning commission’s decision and petitioners’ brief refer to these conditions by their numerical
listing, and for ease of reference, we do so as well.

1 [LDR zone] because the city has determined that in order to provide
2 adequate service to one LDR lot a minimum of 3,206 square feet of
3 right-of-way is necessary. Since two lots are being created, the city
4 could require up to 6,412 square feet. Because 4,371 square feet is less
5 than 6,412 square feet, the required dedication is less than what could
6 be required if an exact pro rata dedication were required.

7 “4. The creation of the panhandle driveway, as proposed by [petitioners],
8 will impact the safety at the intersection of M Street and 8th Street by
9 adding an additional 9 conflict points to the existing 32 conflict points
10 and additional conflict points will occur with the school children using
11 the most direct route to their appropriate public schools. It is difficult
12 to assign a quantifiable value to decreased traffic safety in order to
13 establish proportionality. Therefore, the proper method to mitigate the
14 degraded traffic safety is to restore the level of safety to its state prior
15 to the impact. In order to mitigate the safety impacts specific to this
16 proposed development, [petitioners] shall dedicate sufficient right of
17 way to facilitate the extension of M Street and thereby reduce the
18 number of conflict points to the number in existence prior to the
19 development. In this case that required dedication is 20 feet along the
20 southern property line.

21 “5. The Planning Commission finds that the property will benefit [from
22 the exactions] in the following manner:

23 “a. Parcel 3 will have improved access and full frontage onto a city
24 street. This will result in intangible safety improvements such
25 as providing secondary emergency access for residents when
26 other internal accessways are blocked (such as a car parked in
27 the panhandle driveway). The on-street parking available with
28 the extension of M Street will benefit the property by providing
29 four parking spaces in front of the lot. This is particularly
30 beneficial to Parcel 3 because it is encumbered with over 1,000
31 square feet of easements that will make the lot difficult to
32 develop with both a dwelling and adequate parking/turn-
33 around areas.

34 “b. All three parcels will have safer and better transportation
35 connectivity. All trips to the north (towards the closest grocery
36 store/commercial center) will be 0.25 miles shorter. If one
37 quarter of all 29 trips generated by the three lots travel north,
38 each day there will be 1.875 miles of out-of-direction travel.
39 Over the course of one year, this out-of-direction travel will
40 equal 662 miles.

41 “c. The transportation safety of future residents of all three parcels
42 will be improved because there will be nine fewer traffic

1 conflict points directly adjacent to the site. While the true value
2 of this increased safety is difficult to quantify, reducing the
3 number of points where a potential accident may occur is a
4 benefit to the site. This is particularly important to this
5 particular site because at a minimum the nine additional
6 conflict points will involve drivers entering and exiting the
7 proposed panhandle driveway for Parcel 3.

8 “d. Fire and Life Safety vehicles will be able to reach the property
9 faster. Springfield’s 5th Street fire station is located 300 feet
10 north of M Street, west of the site. When M Street is extended,
11 emergency vehicles will travel 0.25 miles to reach the
12 development area and make one left hand turning movement.
13 Without the M Street extension, emergency vehicles must
14 travel 0.51 miles and make two left hand turns, one of which is
15 at the signalized intersection of Centennial and 5th Street. It is
16 difficult to assign a value to swifter emergency response;
17 however, emergency response that takes half the time, as
18 would be the result with the M Street extension, is a benefit to
19 the subject property.

20 “e. Public Services, such as storm drainage, water and electricity
21 can be provided in a more efficient manner. With the
22 panhandle driveway, private utilities such as pipes for
23 conveying stormwater, water supply lines, electrical service
24 lines and telephone service lines must be extended 83 feet
25 down the panhandle driveway to reach the public lines in the
26 right-of-way. Because these utility services will all be within a
27 private driveway, the city will not take maintenance
28 responsibility and the property owner will be responsible for
29 their maintenance in perpetuity. If they are within the public
30 right-of-way of the extended M Street, the services will be
31 public and maintained by the city.

32 “f. The development potential of Parcel 1 will be enhanced
33 because a duplex will be a permitted use for the lot upon
34 dedication of the right of way for M Street. Increasing the
35 highest and best use potential for the site is beneficial to the
36 property.

37 “6. The findings adopted at the July 7, 1999 public hearing in support of
38 the Director’s decision, while perhaps individually insufficient to
39 establish rough proportionality, are nonetheless valid. When evaluated
40 cumulatively with the additional new findings they assist in providing
41 the evidence that fulfills the rough proportionality test required by the
42 *Dolan* decision. The Planning Commission hereby readopts the July 9,
43 1999 findings into the record of these proceedings.” Record 4-5.

1 **INTRODUCTION**

2 This appeal requires that we again review the city’s decision to determine whether it
3 complies with the Supreme Court’s strictures in *Dolan*. Before we proceed to that analysis,
4 however, some preliminary discussion of the Court’s and Oregon’s Fifth Amendment takings
5 jurisprudence is appropriate.

6 **A. *Nollan v. California Coastal Commission***

7 In *Nollan v. California Coastal Commission*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d
8 677 (1987), the Court struck down a decision by the commission that required the
9 conveyance of an oceanfront access easement to ameliorate the loss of public views of the
10 ocean across an upland property. In doing so, the Court held that there was undoubtedly a
11 legitimate governmental interest in retaining public oceanfront views, but that the exaction
12 lacked an “essential nexus” with that governmental interest. 483 US at 837. In reaching its
13 conclusion, the Court stated that if the commission had required the property owners to
14 provide an upland viewing area as a condition of permit approval, that would not constitute a
15 taking, because the commission could, presumably, deny the permit because the proposal
16 would otherwise block the desired views. However, absent some nexus between the
17 legitimate governmental interest and the exaction, to require the grant of access rights along
18 the beach in exchange for the permit converted a process where the commission protected its
19 legitimate governmental interests to an “out-and-out plan of extortion.” *Id.*

20 **B. *Dolan v. City of Tigard***

21 In *Dolan*, the Court held that a local government seeking to obtain land for public
22 purposes through an exaction must demonstrate that the exaction is in “rough
23 proportionality” to the impacts of the proposed development. 512 US at 391. To do this, the
24 local government must show that the exaction is “related both in nature and extent to the
25 impact of the proposed development.” *Id.* According to the Court, the local government’s
26 demonstration of that relationship does not require a “precise mathematical calculation” but

1 does require some quantification. *Id.* at 395-96. *Dolan* elaborates on the necessary *degree* of
2 relatedness or nexus between the development’s impacts on the local government’s
3 legitimate governmental interests and the exactions imposed to mitigate those impacts.

4 In reaching its decision, the Court resolved conflicts between different circuits as to
5 the required degree of connection under the Fifth Amendment between impacts and
6 exactions. It rejected the “specifi[c] and uniquely attributable test,” which requires (1)
7 exacting scrutiny and (2) a nearly exact match between the exaction and the impact. *Id.* at
8 389-90. The Court also rejected the idea that the exaction could be supported by “very
9 generalized statements as to the necessary connection” between the exaction and the
10 development. *Id.* at 389. The Court indicated that the appropriate standard under the U.S.
11 Constitution was closer to the intermediate “reasonable relationship” test that had been
12 adopted in many jurisdictions, including Oregon. *Id.* at 391. However, the Court did not
13 adopt the reasonable relationship test as such and instead described the appropriate test as
14 “rough proportionality.” *Id.* ²

15 **C. *Art Piculell Group v. Clackamas County***

16 In *Art Piculell Group v. Clackamas County*, 142 Or App 327, 922 P2d 1227 (1996),
17 the Court of Appeals elaborated on the articulation obligation imposed by *Dolan*. Where
18 findings are used to establish rough proportionality, the public body must “articulate and
19 substantiate the requisite facts and legal conclusion” that support the exaction. *Id.* at 331.
20 Further, those findings must show with particularity the “relationship between a

²The reason given by the Court for not adopting the reasonable relationship test, as such, was to avoid confusion with the “term ‘rational basis,’ which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.” 512 US at 391. We believe the Supreme Court in *Dolan* intended to recognize that reasonable persons might disagree about whether any given exaction has the requisite degree of connection with the impacts that are relied upon to justify the exaction. In that sense, the Court accepted the reasonable relationship test. However, the reason given by the Court for adopting the “rough proportionality” test makes it clear that a relatively high level of scrutiny is to be applied on appellate review of local government decisions that impose exactions. In addition, and perhaps consequently, the Court shifted the burden to the local government to justify the exaction and imposed a specific requirement that the local government “make some effort to quantify its findings in support of the dedication.” *Id.* at 395-96.

1 developmental condition and the impacts of development.” *Id.*, quoting *J.C. Reeves Corp. v.*
2 *Clackamas County*, 131 Or App 615, 618, 887 P2d 360 (1994). The court also stated that
3 benefits that accrue to the development may be relevant factors in that

4 “the *Dolan* analysis allows consideration and appropriate weighing of whether
5 and to what extent a condition serves needs of the development upon which it
6 is imposed, as distinct from serving *only* general public needs in response to
7 the public impacts of the development.” 142 Or App at 337 n 4 (emphasis in
8 original).

9 **D. LUBA’s Review**

10 In this case, we must weigh the identified impacts and benefits against the required
11 dedications to determine whether the city has demonstrated that they are roughly
12 proportional. No party questions that the stated governmental interests are legitimate. In this
13 appeal, petitioners raise issues concerning the nexus between the legitimate governmental
14 interests and the exactions (*Nollan*) and the relationship between the nature and extent of the
15 exactions and the impacts of the proposed development (*Dolan*). For the following reasons,
16 we conclude that two of the exactions imposed by the city on petitioners’ development have
17 not been adequately justified.

18 **INCREMENTAL IMPACTS**

19 Petitioners argue that the city cannot demonstrate that the impacts from the proposed
20 development result in *any* impact on the city’s services, because the city has not
21 demonstrated that the additional vehicular trips that may be generated from the property will
22 cause a breakdown in city services. Petitioners contend that the city must demonstrate that
23 there is insufficient road capacity to absorb an additional 19 vehicle trips per day that may be
24 generated from the partition before it can require dedication of right-of-way to alleviate that
25 impact. Petitioners concede that this approach may result in one relatively minor
26 development being required to bear the full cost of improving an entire road segment because
27 it is the development that generates the final increment of traffic that causes the traffic to

1 exceed road capacity. However, petitioners contend that is the only means by which the city
2 can demonstrate that its exactions are roughly proportional.

3 We reject that argument. To the extent a local government identifies an impact and
4 demonstrates that the exaction is roughly proportional to that impact, incremental impacts
5 attributable to a development may give rise to an exaction, even if the impacts will not cause
6 a facility to fail or drop to a lower level of service.

7 The second assignment of error is denied, in part.³

8 **“NEXUS” AND “NATURE AND EXTENT”**

9 We now turn to the individual exactions to determine whether they satisfy *Nollan*'s
10 nexus requirement and the requirement in *Dolan* that the local government demonstrate that
11 the exaction is roughly proportional to the impacts of development. We first establish what
12 we understand the city's legitimate governmental interests are in requiring the particular
13 exaction. We then decide whether there is a sufficient nexus between the governmental
14 interests and the exaction, *i.e.*, does the exaction further the stated governmental interest. If
15 there is a sufficient nexus between the governmental interests and the exaction, we look to
16 see if the city has sufficiently articulated and substantiated the relationship between the
17 exaction and the impacts of development, *i.e.*, that they are related in nature and extent and
18 are roughly proportional. In doing so, we review the stated benefits to the property that are
19 obtained as a result of the exactions to determine the extent to which those benefits support
20 the exactions.

³We address the remainder of the second assignment of error in our discussion of the city's quantification of impacts to justify the M Street exaction, below.

1 **A. M Street Right-of-Way Exaction**

2 **1. Essential Nexus Between the Legitimate Governmental Interest**
3 **and the Right-of-Way Exaction**

4 The city’s decision provides four main justifications for the M Street right-of-way
5 dedication. According to the city, the proposed dedication will (1) promote traffic safety by
6 limiting intersection conflicts between the driveway access to Parcel 3 and 8th Street; (2)
7 increase connectivity within the vicinity by providing an alternative access to collector
8 streets; (3) improve emergency response times by providing a shorter and more efficient
9 route for fire and other emergency vehicles to reach the subject property and its immediate
10 vicinity; and (4) mitigate an increase in traffic congestion caused by petitioners’
11 development.

12 Petitioners contend in their fourth assignment of error that even if the city’s stated
13 purposes for requiring right-of-way are plausible, those purposes will not be served by the M
14 Street exaction. According to petitioners, one of the reasons the city gives for requiring the
15 right-of-way for M Street is to avoid additional “conflict points” between vehicles
16 originating from petitioners’ development and other vehicles, bicyclists and pedestrians.
17 Petitioners argue that a flag driveway from Parcel 3 to 8th Street will have fewer conflicts
18 than access from Parcel 3 onto M Street because only southbound turns from 8th Street will
19 interfere with traffic traveling on M Street. Petitioners argue that if Parcel 3’s access is onto
20 M Street, *all* vehicles originating from Parcel 3 will conflict with pedestrian and bicycle
21 traffic westbound on M Street. Petitioners also argue that it is unlikely that M Street will be
22 developed within the foreseeable future and so the city’s conclusions that the proposed
23 exactions will improve connectivity and shorten emergency response times are too
24 speculative to be included in a *Dolan* analysis.

25 The city responds that the proposed development will increase conflicts between
26 different modes of transportation by adding an access that is too close to the 8th Street and M
27 Street intersection. As for the likelihood of M Street being developed, the city argues that

1 with petitioners' dedication, there is only one more segment that must be acquired to obtain
2 the necessary right-of-way to begin road improvements. According to the city, staff has had
3 conversations with the owner of that property, and believes that the right-of-way will be
4 obtained relatively shortly. The city also argues that development on the subject property is
5 equally speculative, and that it is possible that the road will be improved prior to residential
6 development of the parcels. Therefore, the city contends that there is a nexus between the
7 city's legitimate governmental interests and the exactions.⁴

8 We agree with the city that there is a substantial nexus between the city's legitimate
9 governmental interests and the M Street dedication. The fourth assignment of error is denied,
10 in part.

11 **2. Nature of Impacts/Exaction**

12 The city contends that, unlike a road, where almost all traffic is moving forward, the
13 driveway for Parcel 3 allows for cars to exit by moving in reverse, thus creating conflicts
14 with those persons who may be entering the intersection by way of M Street. The city argues
15 that these additional conflict points justify an exaction that will, in essence, eliminate them.

16 As explained above, petitioners contest the factual determination that the partition, as
17 proposed, will result in additional conflicts within the M Street and 8th Street intersection.
18 However, we believe that there is substantial evidence in the record to demonstrate that the
19 proposed access to Parcel 3 will result in additional intersection conflicts that require
20 amelioration, and that the planning commission could reach the conclusion that the proposed
21 exaction will rectify the safety concern.

22 **3. Extent of Impacts/Exaction**

23 In their second and third assignments of error, petitioners contend that the methods
24 the city used to quantify the impacts caused by the development on the city's transportation

⁴We address the weight that should be given to those future benefits later in our decision.

1 system do not demonstrate the requisite rough proportionality. *See* Supplemental Findings 2
2 and 3, *supra*. According to petitioners, the focus of the inquiry necessarily has to be on the
3 development itself and its impacts on the city's infrastructure, and *not* on the generalized
4 impacts any development would have on city services. Petitioners contend that, by
5 comparing the average square feet of right-of-way per lot in a particular study area, or by
6 examining the relative number of vehicle trips that may be generated by the proposed
7 development as a ratio of the number of vehicles accessing nearby arterials, the city merely
8 quantifies the general public benefit, and does nothing to quantify the particular impacts the
9 addition of two parcels in this location will have on the city's transportation system.
10 According to petitioners, the fact that the city has, through one means or another, acquired a
11 certain amount of right-of-way to support the city transportation system does not mean that it
12 can exact from petitioners an across-the-board proportional amount.

13 In Supplemental Finding 2, the city calculated the number of daily trips generated
14 from the proposed partition, expressed as a percentage of the total number of daily trips
15 generated from dwellings located on the two local roads used to access nearby arterials (1.86
16 percent). Then the city calculated that the percentage of right-of-way exacted (4,371 square
17 feet) expressed as a percentage of the total right-of-way occupied by those two local roads is
18 1.59 percent. The city then compared the two calculations and concluded that, because the
19 percentage of property exacted was less than the percentage of vehicular trips generated by
20 the subject property, the exaction was roughly proportional to the impacts.

21 Contrary to petitioners' argument, we believe Supplemental Finding 2 does establish
22 a relationship between impacts generated by the subject property and the exacted right-of-
23 way. Supplemental Finding 2 essentially quantifies the increased traffic congestion
24 attributable to petitioners' development and attempts to relate the nature and extent of those
25 impacts to the proposed exactions. However, we agree with petitioners that the quantification

1 of impacts does not, in and of itself, establish that the extent of the proposed exaction is
2 roughly proportional to the extent of the proposed impacts.

3 With regard to Supplemental Finding 3, we agree with petitioners that it fails entirely
4 to quantify the impacts of this development so as to justify the exaction. In our view, the city
5 crafted Supplemental Finding 3 from the perspective of exacting the amount of right-of-way
6 the city needs to accomplish its general transportation goals rather than determining the
7 extent to which petitioners' development frustrates them. *Art Piculell Group* and *J.C. Reeves*
8 *Corp.* explain that a local government must consider the impacts related to the proposed
9 development, not merely establish a broad relationship between the development and the
10 city's programs for public improvement and assess a gross pro rata share to the development.

11 **4. Benefits**

12 In their fourth and fifth assignments of error, petitioners argue that the city's decision
13 either considers benefits to the development that are not properly viewed as benefits, or gives
14 those benefits more weight than they deserve. Petitioners concede that if M Street is
15 developed contemporaneously with the development of petitioners' property, there may be
16 some benefit, *e.g.*, an increase in property value, resulting from being located on a fully
17 developed street. However, petitioners argue that the city has yet to acquire all of the right-
18 of-way it needs to improve M Street, and has no plans to initiate public improvements until
19 all of the right-of-way is acquired. Petitioners contend that until the city can demonstrate that
20 there will be some benefit accruing to the property as a result of the dedication, those
21 benefits listed by the city that are based on improved access are illusory. In addition,
22 petitioners argue that the benefits that the property may receive by improving traffic safety
23 are no different from those benefits that are enjoyed by the community as a whole, and to the
24 extent those benefits exist, they have not been sufficiently quantified to satisfy *Dolan*.

25 For its part, the city concedes that some of the benefits the city has included in its
26 findings are not quantified. However, the city argues that the benefits that accrue to the

1 property in terms of increased connectivity, safer travel on local streets and arterials, reduced
2 out-of-direction travel, and off-site parking are benefits that are specific to the subject
3 property, and can only be obtained through the maintenance of the community's standards, as
4 established by Supplemental Findings 2, 3 and 4. The city contends that these benefits are
5 tangible enough to be considered in the *Dolan* analysis. In addition, the city contends that the
6 benefit of greater development flexibility is immediately available to petitioners, including
7 the ability to site utilities within the public right-of-way, and the ability to develop Parcel 1
8 with a duplex.

9 Finally, the city argues that the timing of the development of M Street is irrelevant to
10 the determination of whether an exaction is roughly proportional to the impact caused by a
11 development. The city contends that even if it is relevant, petitioners' argument about the
12 foreseeability of the M Street improvements is without merit because petitioners have not
13 established when their property is going to be developed, or if it is going to be developed as
14 assumed. The city states that it has acquired right-of-way at 7th Street and M Street and that
15 it is possible that development on the right-of-way will precede the development of
16 petitioners' property.

17 It is clear that petitioners will derive some benefits from the exactions, and that those
18 benefits may be considered in the *Dolan* analysis. Development flexibility is a benefit, as is
19 safer and more varied access. We also believe that there is a benefit to the property by siting
20 utilities within a public right-of-way and by having the city maintain those utilities.⁵ It is true
21 that, unless there is some evidence in the record to show that development of street access is
22 reasonably foreseeable, the benefits attributable to that street access may be illusory. In this
23 case, we believe there is sufficient evidence in the record to show that the benefits that the
24 city has described, while difficult to quantify, do exist and should be considered in

⁵Petitioners argue that they already have the right to site utilities within the public right-of-way. However, they have not cited us to evidence in the record to show that this is indeed the case.

1 determining whether the city’s exaction of 20 feet of right-of-way for M Street is
2 constitutional. The city did not err by considering the benefits it attributes to the M Street
3 improvements in its *Dolan* analysis.

4 **5. Conclusion**

5 The city’s principal problem with respect to the M Street right-of-way is not
6 relatedness in nature but relatedness in extent. Simply put, the city’s proposed M Street
7 exaction may take too much, compared to the identified impacts, safety issues and benefits to
8 the property.

9 Reported cases provide little or no guidance in reviewing challenges to exactions
10 based on an impermissible extent. The only Oregon case we are aware of that touches on that
11 issue is *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994). *Schultz*
12 involved a partition of a 3.85-acre parcel with an existing house into two parcels. The city
13 assumed that the new parcels would ultimately be subdivided into 15 or more new home
14 sites, and imposed right-of-way exactions, amounting to 20,000 square feet, intended to
15 offset the impacts of those potential new homes. The Court of Appeals rejected that
16 approach, because no such proposal for subdivision was before the city. The court found
17 nothing in the record to connect the exactions with the proposal that *was* before the city: a
18 partition into two parcels. The partition by itself would presumably yield only one new
19 house. The court commented:

20 “Even taking into account the city’s data reflecting the number of vehicle trips
21 per day that the city assumes each new household will generate, the fact that
22 there is an increase of eight vehicle trips on Beacon Drive and Savage Street
23 each day hardly justifies requiring petitioners to part with 20,000 square feet
24 of their land without compensation. That does not comport with what the
25 Supreme Court meant by ‘rough proportionality.’” 131 Or App at 228.

1 The court in *Schultz* appeared to consider a ratio of eight new vehicle trips to an
2 exaction of 20,000 square feet to be manifestly unsupportable under *Dolan*.⁶ Framed in that
3 way, the present case is a much closer question. The proposed development has
4 approximately twice the vehicular impacts of that at issue in *Schultz*, and the proposed M
5 Street exaction is approximately five times smaller. Expressed as the ratio of new vehicle
6 trips to the square footage of the exaction, the ratio in the present case is more than ten times
7 smaller than the ratio in *Schultz*. Further, there are in the present case identified safety
8 concerns and benefits to the property that were apparently not present in *Schultz*. Although it
9 is a very close question, we believe that the identified impacts, safety concerns and benefits
10 justify the M Street exaction.

11 The second and fifth assignments of error are denied. The third assignment of error is
12 sustained. The fourth assignment of error is denied, in part.

13 **B. “Clipped Corner” and Sidewalk Exactions**

14 **1. Nexus**

15 Petitioners argue that the city’s findings fail to establish a nexus between the
16 governmental interests in traffic safety and the alleviation of congestion and the exactions for
17 a clipped corner and sidewalks on 8th Street.⁷ According to petitioners, the city’s findings
18 pertain only to the right-of-way for vehicular traffic; they are wholly inadequate to establish
19 any basis for exacting the remaining right-of-way.

20 There is a logical connection between the city’s legitimate governmental interests and
21 the exactions for the clipped corner and sidewalks. Presumably, those exactions will provide

⁶However, we do not understand the court to suggest that such ratios are an optimum or necessary way of assessing either rough proportionality or the question of impermissible extent.

⁷According to the findings supporting the city’s initial decision, the clipped corner is needed “to allow for future sidewalk and handicapped ramp construction.” *McClure I* Record 70. Therefore, we believe it is appropriate to analyze the city’s justification for the clipped corner exaction in conjunction with our analysis of the city’s 8th Street sidewalk exaction.

1 a separation between the different modes of transportation and will allow additional sight
2 distance for the users of the road. We conclude that there is an essential nexus between the
3 exactions and the city’s legitimate governmental interests.

4 **2. Nature of Impacts/Exaction**

5 Petitioners argue that the city has utterly failed to demonstrate that there will be any
6 impact from the development on pedestrian and bicycle traffic. Petitioners contend that there
7 may be a relationship between the dedication of the M Street right-of-way for vehicular
8 traffic based on the impacts the development’s vehicles will have on the city’s streets.
9 However, petitioners argue in their first assignment of error that neither the initial city
10 decision nor the decision on remand establishes a relationship between the impacts caused by
11 the development and the city’s exactions relating to the clipped corner and sidewalk.
12 Petitioners contend that separate analysis and evidence is required to support these exactions.

13 The city argues that it is not necessary to establish a rough proportionality between
14 each and every exaction and the impacts that justify those exactions. According to the city,
15 all of the exactions fall under the general umbrella of transportation improvements and the
16 impacts of the development’s vehicular traffic also justify exactions that are needed to serve
17 pedestrian and bicycle traffic.

18 Generally speaking, dedications for sidewalks and other public ways are reasonable
19 exactions to avoid excessive congestion from a proposed use of property. *Dolan*, 512 US at
20 395. However, we agree with petitioners that, like the city in *Dolan*, the city here has failed
21 to establish a relationship between the vehicular and nonvehicular impacts of the proposed
22 development and the required dedication of land for sidewalks along 8th Street. As we stated
23 in *McClure I*, the city’s findings are flawed in that they

24 “make no attempt to establish a relationship between the number of
25 nonvehicular trips from the proposed development, whatever that number may
26 be, and its effect on the transportation system.” 37 Or LUBA at 773.

27 We do not agree with the city that it can exact land for sidewalk improvements under

1 the rubric of general transportation needs without some attempt to make an “individualized
2 determination” that relates identified impacts to the exactions. With respect to the clipped
3 corner, the city’s findings fail to make any kind of individualized determination whatsoever.

4 Petitioners’ first assignment of error is sustained, in part.

5 **C. Improvement Agreement**

6 In their first assignment of error, petitioners also contend that the city’s findings are
7 wholly inadequate to justify Condition 10. *See* n 1. Petitioners argue that any exactions
8 imposed in an improvement agreement must similarly comply with *Dolan*.

9 The city responds that the improvement agreement is merely a waiver of
10 remonstrance to the formation of a local improvement district, and does not prevent
11 petitioners or successors in interest from protesting the percentage or amount of
12 improvement costs. The city contends that such an agreement is not subject to a takings
13 analysis under the Fifth Amendment, because there is no loss of the beneficial use of
14 property as a result of the condition.

15 We agree that a waiver of remonstrance to the formation of a local improvement
16 district is not subject to the analysis required by *Dolan* because it, by itself, does not result in
17 a loss of petitioners’ property.

18 Petitioners’ first assignment of error is denied, in part.

19 **CONCLUSION**

20 The city’s findings on remand provide a more detailed *Dolan* analysis to justify its
21 exactions. The findings demonstrate that the M Street exaction satisfies the *Dolan* rough
22 proportionality requirement. However, we again conclude that the findings the city adopted
23 to support all of its exactions fall short of what the Fifth Amendment requires. In particular,
24 the city failed to make individualized determinations explaining why the 8th Street sidewalk
25 and the clipped corner exactions are roughly proportional to the identified impacts of the
26 proposed development.

1 The city’s decision is remanded.

2 Holstun, Board Member, concurring.

3 I concur with the majority that the challenged decision must be remanded. Although
4 I agree with the result reached in this case, I write separately to emphasize what I perceive to
5 be the central problem that local governments face under *Dolan* and to suggest a way to deal
6 with it. The central problem under *Dolan*’s rough proportionality test is that the things that
7 must be shown to be roughly proportional in *extent* (exactions and impacts) are different
8 kinds of things.⁸ This makes it difficult to compare them directly in any meaningful way.⁹
9 One of the city’s solutions to this problem is to develop surrogate comparisons that it can
10 quantify.¹⁰ That approach, while permissible under *Dolan*, will always be inconclusive. In
11 addition, such an approach will always be subject to the criticism and weakness that it is not
12 really comparing the impacts and exactions that the city ultimately must show are roughly
13 proportional.

14 One way to directly compare impacts and exactions in a meaningful way is to reduce
15 those exactions and impacts to a common commodity or measurement. One obvious
16 possibility is dollars. Placing an estimated value on the land or improvements that a local
17 government seeks to exact will require some additional expense and effort, but should not be
18 inordinately difficult. Estimating the costs to the local government of responding to expected
19 development impacts, and determining whether an applicant for development approval can
20 reasonably be expected to pay part or all of that cost through exactions, will involve more

⁸I think it will be an exceedingly rare case where the *Nollan* requirement for an essential nexus between the exaction and the public purpose that is relied on to justify the exaction will be lacking. Similarly, it will be an exceedingly rare case where the *Dolan* requirement that the exaction and development impacts be related in *nature* will be lacking. Both of those requirements are clearly met in this case. The only real issue in this case is whether the exactions and development impacts are roughly proportional in *extent*.

⁹For example, the difficulty of describing how a particular number of additional vehicle trips and a particular amount of land are roughly proportional seems obvious.

¹⁰Supplemental Findings 2 and 3 are examples.

1 effort and expense and will be more difficult. However, I do not see any reason why, with
2 appropriate study and documentation, a defensible estimate of the recoverable cost to the city
3 for each additional auto trip, school child, park user, pedestrian, etc. could not be developed.
4 Once the exaction and impacts are both reduced to their dollar values, the rough
5 proportionality test becomes much more workable and predictable.

6 *Dolan* clearly does not *require* that impacts and exactions be reduced to a common
7 commodity or measurement to allow them to be directly compared in a meaningful way.
8 However, surrogate comparisons such as the ones that the city employed in this case are
9 inevitably going to be inconclusive and subject to criticism. Because the ultimate legal
10 standard is subjective and the level of scrutiny on review is heightened under *Dolan*, the
11 local government's ability to predict in advance whether such surrogate comparisons will
12 suffice to demonstrate rough proportionality will inevitably be an uncertain exercise.¹¹

13 In this case, I believe the city's discussion of quantified surrogate comparisons and
14 safety concerns with the Parcel 3 driveway as proposed, along with the identified benefits
15 that the new lots will obtain from the M Street extension, succeed in demonstrating rough
16 proportionality between the exaction and the impacts, although it is a close question. I do not
17 believe the city came particularly close to demonstrating rough proportionality between the
18 required dedication of land for the sidewalk and identified impacts and benefits.¹²

¹¹I note that, although the uncertainty created under *Dolan*'s rough proportionality requirement is relatively new, uncertainty is nothing new to Fifth Amendment takings jurisprudence. See *Agin v. Tiburon*, 447 US 255, 260-61, 100 S Ct 2138, 65 L Ed 2d 106 (1980) ("no precise rule determines when property has been taken, [however,] the question necessarily requires a weighing of private and public interests"); *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 1568, 4 L Ed 2d 1554 (1960) (Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 415, 43 S Ct 158, 67 L Ed 322 (1922) (regulation that goes "too far" may constitute a taking of property). What is new under *Dolan* is the shifting of the burden to the city to justify that its exaction does not violate the Fifth Amendment and the heightened scrutiny that is applied to that justification on review. *Art Piculell Group*, 142 Or App at 331-32.

¹²Such a case can perhaps be made, particularly if such sidewalk improvements can properly be viewed as primarily benefiting petitioners' property. However, the city's decision fails to make that case.