

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 04/26/18 PM 1:43 LUBA

4 DAN HILL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2018-001

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Christopher P. Koback, Portland filed the petition for review and argued
20 on behalf of petitioner. With him on the brief was Hathaway Larson LLP.

21
22 Lauren A. King, Deputy City Attorney, Portland, filed a response brief
23 and argued on behalf of respondent.

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

27
28 AFFIRMED

04/26/2018

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

NATURE OF THE DECISION

Petitioner appeals a city hearings officer decision approving his land division application with conditions.

FACTS

Petitioner applied to divide a 1.06-acre parcel of residentially-zoned land into three separate parcels. The 1.06-acre parcel presently includes one existing single-family dwelling, which is to be retained. Petitioner’s proposal would allow one single-family dwelling to be constructed on each of the two newly-created parcels.

Petitioner’s parcel fronts on SE 122nd Drive and SE 124th Avenue. SE 122nd Drive has a 20-foot paved surface within a 40 to 45-foot right-of-way and lacks curbs and sidewalks. SE 124th Avenue is unimproved within a 24-foot right-of-way, which is not needed for access to petitioner’s parcel. No public storm sewer is currently available to the property.

The city’s Bureau of Development Services (BDS) approved petitioner’s land division application pursuant to a Type Iix land division review.¹ The

¹ Portland City Code (PCC) 33.660.110, Review Procedures, provides procedures for review of preliminary plans according to the type of land division proposal. A “Type Iix” land division proposal includes a land division, such as petitioner’s, that includes “[t]wo or three lots, where any portion of the lots, utilities, or services are proposed within a Potential Landslide Hazard Area[.]” PCC 33.660.110(B)(2). Under Type Iix review, an initial decision is rendered by the BDS Director, following consultation with the applicant and

1 BDS decision made a series of findings concluding that the dedication of a
2 portion of right-of-way on SE 122nd Drive and SE 124th Avenue, as well as a
3 street and storm sewer waiver of remonstrance were required conditions of
4 approval.

5 The BDS decision found that the existing transportation system is
6 capable of safely supporting the proposed development and that no conditions
7 of approval were required to mitigate any traffic impacts associated with the
8 proposed development. Record 198. However, the BDS decision also
9 determined that the existing street widths and improvements on both SE 122nd
10 Drive and SE 124th Avenue do not comply with adopted city street standards.
11 *Id.* at 198-203. The decision further determined that the Local Transportation
12 Infrastructure Charge (LTIC) is required, which the applicant could satisfy
13 either by constructing right-of-way improvements or by paying the LTIC fee.²
14 *Id.* Petitioner did not indicate whether he planned to pay the LTIC or construct
15 the required right-of-way improvements. Finally, the BDS decision found that
16 stormwater management criteria and standards are satisfied only if the

other parties. PCC 33.730.025.D.2. The BDS decision is subject to appeal to,
and an evidentiary hearing before, the city land use hearings officer. PCC
33.730.025.G. This approval procedure has a bearing on petitioner's challenge
to an analysis that was first submitted by the Portland Bureau of Transportation
to the hearings officer, after the BDS decision was appealed by petitioner.

² The city's LTIC is a charge on new infill development occurring on
unimproved and under-improved streets in single-dwelling residential zones.
PCC 17.88.090.

1 applicant provides signed waivers of remonstrance for improvements and
2 dedicates sufficient property. *Id.*

3 Petitioner appealed the BDS decision to the city hearings officer,
4 challenging the conditions of approval requiring the two dedications of
5 property and the waiver of remonstrance. Before the hearings officer, and
6 during the open record period following the hearing, the Portland Bureau of
7 Transportation (PBOT) introduced evidence in support of modifying its
8 recommendation to impose right-of-way dedications only on SE 122nd Drive.
9 Accordingly, the BDS and PBOT staff proposed a modified condition to the
10 hearings officer eliminating the requirement for dedication along SE 124th
11 Avenue. Along with the removal of the requirement for right-of-way dedication
12 along SE 124th Avenue, the final recommendation to the hearings officer
13 included the requirement for the waiver of remonstrance for stormwater facility
14 improvements. The hearings officer approved the land division with the city's
15 recommended conditions, as modified.

16 In this appeal petitioner challenges the conditions of approval.

17 **INTRODUCTION**

18 The principal issues in this appeal revolve around two land division
19 approval criteria, which we refer to in this opinion as the transportation impacts
20 criterion and the services and utilities criterion. We set out relevant text from
21 those criteria below before turning to petitioner's assignments of error.

1 **A. Transportation Impacts Criterion**

2 Review of land divisions in residential zones is governed by Portland
3 City Code (PCC) 33.660. The approval criteria for such land divisions are set
4 out at PCC 33.660.120:

5 **“33.660.120 Approval Criteria**

6 “The Preliminary Plan for a land division will be approved if the
7 review body finds that the applicant has shown that all of the
8 following approval criteria have been met. The approval criteria
9 are:”

10 There follow twelve approval criteria, A through L. The final two criteria are
11 the transportation impacts criterion and the services and utilities criterion. The
12 transportation impacts criterion is set out at PCC 33.660.120.K, and provides:

13 **“Transportation Impacts.** The approval criteria of [PCC] 33.641,
14 Transportation Impacts, must be met[.]”

15 PCC 33.660.120.K simply incorporates by reference the PCC 33.641
16 transportation impacts criterion which is set out below, together with its
17 companion section governing mitigation:

18 **“33.641.020 Approval Criterion**

19 “The transportation system must be capable of safely supporting
20 the proposed development in addition to the existing uses in the
21 area. Evaluation factors include: street capacity and level-of
22 service; vehicle access and loading; on-street parking impacts; the
23 availability of transit service and facilities and connections to
24 transit; impacts on the immediate and adjacent neighborhoods; and
25 safety for all modes.

26 **“33.641.030 Mitigation**

1 The applicant may meet the criterion in Section 33.641.020,
2 above, by including mitigation measures as part of the land
3 division proposal. Mitigation measures must be acceptable to the
4 City Engineer and may include providing transportation demand
5 management measures, an access management plan, constructing
6 streets, alleys, or bicycle, pedestrian, or transit facilities on or off
7 the site or other capital improvement projects such as traffic
8 calming devices.”

9 **B. The Services and Utilities Criterion**

10 The PCC 33.660.120.L services and utilities criterion appears
11 immediately after the transportation impacts criterion. The text of the services
12 and utilities criterion is set out below:

13 “**Services and Utilities.** The regulations and criteria of [PCC]
14 33.651 through 33.654 which address services and utilities, must
15 be met.”

16 As with the PCC 33.660.120.K transportation impacts criterion, the PCC
17 33.660.120.L services and utilities criterion simply incorporates by reference
18 criteria located elsewhere in the PCC: PCC 33.651 (Water Service); PCC
19 33.652 (Sanitary Sewer Disposal Service), PCC 33.653 (Stormwater
20 Management) and PCC 33.654 (Rights-of-Way).

21 As we explain in more detail below, the disputed conditions requiring
22 dedication of land for right-of-way widening and street and utility
23 improvements are based on the incorporated PCC 33.654 rights-of-way criteria
24 rather than the incorporated PCC 33.641 transportation impacts criterion.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer erred in denying his appeal and
3 approving his land division application subject to BDS's and PBOT's proposed
4 conditions of approval, because the city's conditions of approval—requiring
5 petitioner to dedicate right-of-way adjacent to his property—constitute an
6 unconstitutional exaction that is prohibited by the Fifth Amendment to the U.S.
7 Constitution. The conditions are unconstitutional, according to petitioner,
8 because the city found that the proposed development will not generate any
9 current impacts that require mitigation to satisfy the PCC 33.641.020
10 transportation impacts criterion. Therefore, according to petitioner, no essential
11 nexus exists between impacts arising from petitioner's proposed development
12 and a legitimate local government regulation that would provide a basis to deny
13 petitioner's application if not satisfied. Further, petitioner argues, because the
14 conditions of approval lack a nexus with the proposed development, the
15 exaction cannot be roughly proportional to any impacts generated by the
16 proposed development.³

17 We review the hearings officer's interpretations of the PCC to determine
18 whether they are correct. ORS 197.835(9)(a)(D); *Gage v. City of Portland*, 319
19 Or 308, 317, 877 P2d 1187 (1994). LUBA shall reverse or remand a decision if

³ Later in this opinion, we briefly discuss the essential nexus and rough proportionality requirements that must be satisfied for exactions to avoid running afoul of the Fifth Amendment to the U.S. Constitution.

1 the local government made an unconstitutional decision. ORS
2 197.835(9)(a)(E). For the reasons explained below, we agree with the city that
3 the hearings officer properly construed the PCC and the city's conditions of
4 approval are not unconstitutional.

5 **A. The Challenged Conditions of Approval**

6 Under the first assignment of error, petitioner challenges the following
7 two conditions of approval, adopted by the hearings officer:

8 **"B. The final plat must show the following:**

9 "1. The applicant shall meet the street dedication
10 requirements of the City Engineer for SE 122nd
11 Drive. The required right-of-way dedications must be
12 shown on the final plat.

13 "2. The applicant will be allowed to change the lot
14 dimensions by greater than the amount allowed by
15 33.663.200 in order to accommodate street dedication
16 as required by Condition B.1 above." Record 21.

17 Petitioner argues that in adopting these conditions of approval, the
18 hearings officer erred because the conditions exact private property for future
19 street improvements, while at the same time finding that petitioner's proposed
20 development did not generate traffic impacts under PCC 33.641.020 that
21 require the kinds of mitigation authorized by PCC 33.641.030.

22 **B. The City's Conditions of Approval Do Not Constitute an**
23 **Unconstitutional Exaction**

24 As relevant here, the Fifth Amendment of the United States Constitution
25 states: "No person shall * * * be deprived of life, liberty, or property, without

1 due process of law; nor shall private property be taken for public use, without
2 just compensation.”⁴ An “exaction” is a condition of approval of a land use or
3 other government permit requiring the transfer of private property to the
4 government without compensation. In *Brown v. City of Medford*, 251 Or App
5 42, 47, 283 P3d 367 (2012), the Oregon Court of Appeals described the two-
6 part test that is applied to exactions:

7 “The relevant constitutional requirements [are] derived from two
8 Supreme Court cases, *Nollan v. California Coastal Comm’n*, 483
9 US 825, 831–32, 107 S Ct 3141, 97 L Ed 2d 677 (1987), and
10 *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L
11 Ed 2d 304 (1994). Together, those cases establish a two-part test
12 for assessing the constitutionality of a government exaction of a
13 dedication of private property: First, the exaction must
14 substantially advance the same government interest that would
15 furnish a valid ground for denial of the development permit—also
16 known as the ‘essential nexus’ prong of the test. *Nollan*, 483 US at
17 836–37, 107 S Ct. 3141. Second, the nature and extent of the
18 exaction must be ‘roughly proportional’ to the effect of the
19 proposed development. *Dolan*, 512 US at 385, 114 S Ct 2309.”

20 **1. Essential Nexus**

21 **a. The Transportation Impacts Criterion**

22 To determine whether the city’s conditions of approval satisfy the
23 “essential nexus” test, the city must show “(1) what interests would allow the

⁴ The Fifth Amendment to the U.S. Constitution applies to the states via the Due Process Clause of the Fourteenth Amendment, which provides: “No state shall * * * deprive any person of life, liberty, or property, without due process of law.” Similarly, Article I, section 18 of the Oregon Constitution states: “Private property shall not be taken for public use * * * without just compensation[.]”

1 city to deny [petitioner's] partition, and (2) how the exaction would serve those
2 interests." *Brown*, 251 Or App at 56. As we have already explained in the
3 introduction above, the PCC 33.660.120.K transportation impact criterion
4 incorporates by reference the PCC 33.641.020 transportation impact criterion,
5 which requires that "[t]he transportation system must be capable of safely
6 supporting the proposed development" and PCC 33.641.030 provides that
7 mitigation measures may be used to satisfy the transportation criterion.

8 The BDS decision adopted the following findings in concluding the
9 proposed land division complies with the PCC 33.660.120.K transportation
10 impacts criterion:

11 "[T]he transportation system is capable of safely supporting the
12 proposed development in addition to the existing uses in the area
13 for all travel modes. * * * No mitigation is necessary for the
14 transportation system to be capable of safely supporting the
15 proposed development in addition to the existing uses in the area.
16 These criteria are met." Record 198.

17 Petitioner argues that because the city found that petitioner's proposed
18 development satisfies the PCC 33.660.120(K) transportation impacts criterion
19 without any required mitigation, the city cannot impose street improvement
20 requirements or require that petitioner dedicate land for such improvements,
21 because those dedication and street improvement requirements lack a nexus
22 with the transportation impacts criterion and the public policies advanced by
23 that that criterion.

1 **b. The Services and Utilities Criterion**

2 In response, the city does not dispute that the hearings officer adopted
3 the BDS finding that the transportation system is capable of safely absorbing
4 the traffic impacts of the proposed development and, therefore the proposed
5 land division satisfies the PCC 33.660.120(K) and PCC 33.641 transportation
6 impacts criterion without any required mitigation. Nevertheless, the city argues,
7 and we agree, that the petitioner’s proposal must also comply with the separate
8 PCC 33.660.120(L) services and utilities criterion, with its incorporated PCC
9 33.654 rights of way criteria, which the hearings officer found was the basis for
10 requiring the dedication of the SE 122nd Drive right-of-way.

11 As we explain in more detail below, although the PCC 33.660.120(K)
12 and PCC 33.641 transportation impacts criterion and the PCC 33.660.120(L)
13 services and utilities criterion, with its incorporated PCC 33.654 rights of way
14 criteria, all are generally concerned with achieving and maintaining an
15 adequate and safe transportation system, the focus of the PCC 33.660.120(K)
16 and PCC 33.641 transportation impacts criterion is directly on the traffic
17 impacts of the proposal while the focus of the PCC 33.660.120(L) services and
18 utilities criterion, with its incorporated PCC 33.654 rights of way criteria, is on
19 the adequacy of rights-of-way to provide automobile, transit and pedestrian
20 access to, from and within the proposed land division. Importantly, despite the
21 overlapping nature of the PCC 33.660.120(K) and PCC 33.641 transportation
22 impacts criterion on the one hand and the PCC 33.660.120(L) services and

1 utilities criterion, with its incorporated PCC 33.654 rights-of-way criteria, on
2 the other, the proposal must comply with *both* sets of requirements. It is the
3 PCC 33.660.120(L) services and utilities criterion, with its incorporated PCC
4 33.654 rights-of-way criteria, that provide the basis for denial of the proposed
5 land division without the required dedication. It is the separate basis for denial
6 provided by the PCC 33.660.120(L) services and utilities criterion, with its
7 incorporated PCC 33.654 rights-of-way criteria, that means the exaction
8 possesses the essential nexus that is required by *Nollan*. That the city did not
9 impose the condition requiring that dedication as “mitigation” under the PCC
10 33.660.120(K) and PCC 33.641 transportation impacts criterion instead of the
11 PCC 33.660.120(L) services and utilities criterion, with its incorporated PCC
12 33.654 rights-of-way criteria, is of no import.

13 The relevant text of PCC 33.660.120 was set out in the introduction and
14 provides that “a land division will be approved if the review body finds that the
15 applicant has shown that *all* of the following approval criteria have been met.”
16 (Emphasis added.) The hearings officer in this matter agreed with the BDS
17 findings that the plain language of PCC 33.660.120 means that both PCC
18 33.660.120(K) and (L) apply as approval criteria for petitioner’s application.
19 Record 6. As noted in the introduction, petitioner’s application for a land
20 division is subject to PCC 33.654, “Rights-of-Way.” In turn, the PCC
21 33.654.020 rights-of-way section provides: “The regulations of this chapter
22 apply to *all* land divisions.” (Emphasis added.) PCC 33.654.120 provides:

1 **“PCC 33.654.120 Design of Rights-of-Way**

2 **“A. Purpose.** The purpose of these standards and approval
3 criteria is to ensure that the vehicle, bicycle, and pedestrian
4 circulation system is designed to be safe, efficient, and
5 convenient.

6 **“B. Non-local street standard.** For streets other than local
7 service streets, the Office of Transportation has approved
8 the right-of-way width and all elements within the street
9 right-of-way.

10 **“C. Local street approval criteria and standards.** The
11 following approval criteria and standards apply to all local
12 service streets except for common greens and shared courts:

13 **“1.** Approval criterion for width of the right-of-way. The
14 width of the local street right-of-way must be
15 sufficient to accommodate expected users, taking into
16 consideration the characteristics of the site and
17 vicinity, such as the existing street and pedestrian
18 system improvements, existing structures, and natural
19 features.

20 **“2.** Standard for configuration of elements within the
21 right-of-way. For public streets, the Office of
22 Transportation has approved the configuration of
23 elements within the street right-of-way. For private
24 streets, the Bureau of Development Services has
25 approved the configuration of elements within the
26 street right-of-way. * * *”

27 Petitioner first argues that the PCC 33.654.120 rights-of-way
28 requirements apply only to *new* streets that are proposed as part of a land
29 division, and that PCC 33.654.120 does not apply to adjacent *existing* streets,
30 like SE 122nd Drive. Petitioner contends the hearings officer improperly
31 concluded that PCC 33.654.120 applies to both new streets proposed as part of

1 a land division and to existing streets. Petition for Review 14-18. As noted
2 above, the hearings officer determined, pursuant to the PCC 33.660.120(L)
3 services and utilities criterion, that petitioner’s application for a land division is
4 subject to PCC 33.654, “Rights-of-Way.” As the hearings officer explained:

5 “Under the clear language of [PCC] 33.654.020, Chapter 33.654
6 applies to *all* land divisions. Nothing in the language of
7 33.654.120.B or C limits their applicability to new rights-of-way
8 and the Appellant points to no language or legislative history
9 reflecting such a limitation.” Record 8 (emphasis in original).

10 Pursuant to *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859
11 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171, 206 P3d
12 1042 (2009), “[t]here is no more persuasive evidence of the intent of the
13 legislature than the words by which the legislature undertook to give
14 expression to its wishes.” (Internal citations omitted.) Here, the hearings officer
15 determined the language of PCC 33.654.020 plainly and unambiguously states
16 that the rights-of-way standards apply to all land divisions, and nothing in the
17 language of the text or context of the rights-of-way provisions indicates an
18 intent on behalf of the city to limit the applicability of those standards to new
19 streets within proposed land divisions.

20 As the hearings officer explained, the “Purpose” section of PCC Chapter
21 33.654 demonstrates that no such limited purpose is intended:

22 “Rights-of-way provide for movement and access to, within, and
23 through a land division site by pedestrians, bicycles, and motor
24 vehicles. These regulations ensure that the right-of-way system
25 will serve each lot in the land division. * * * These regulations

1 protect the public health and safety by ensuring safe movement
2 and access for emergency and services vehicles.” PCC 33.654.010.

3 As we have already noted, SE 122nd Drive provides access “to” the proposed
4 land division.

5 After setting out PCC 33.654.120 rights-of-way standards, which were
6 set out earlier in this opinion, the hearings officer quoted the following findings
7 from the BDS decision:

8 “SE 122nd Drive is improved with a paved roadway, and a gravel
9 shoulder on both sides. There are no curbs, planter strips, or
10 sidewalks. SE 124th Avenue is unimproved within a 24-foot right-
11 of-way. There is no paving, curbs, planter strips or sidewalks.

12 “In reviewing this land division, [PBOT] relies on adopted city
13 street standards to determine *if existing street widths and*
14 *improvements are sufficient for expected users* (residents, visitors,
15 deliveries, and others driving through the neighborhood.) *In this*
16 *case, [PBOT] has determined that the existing streets do not meet*
17 *City standards.* Therefore, the Local Transportation Infrastructure
18 Charge (LTIC) is required. The LTIC requirement may be satisfied
19 by paying money *or by constructing frontage improvements to*
20 *current City standards as described:*

21 “● SE 122nd Drive standard street improvements would include
22 additional paving as needed; curb 13-ft from the right-of-
23 way centerline, 8-ft public stormwater facility, 5-ft
24 sidewalk, and a 0.5-ft frontage zone. *Property dedication of*
25 *2-7 feet is required to accommodate improvements.*

26 “● SE 124th Avenue standard street improvements would
27 include a 14-foot pedestrian corridor (0.5-ft curb/8-ft (min.)
28 combination planter/stormwater management area/5-ft
29 sidewalk/0.5 ft setback to the property line). In addition to
30 the sidewalk and swales, a minimum 20-ft roadway must be
31 provided along the entire site frontage. *Property dedication*

1 of 14.5 feet is required to accommodate these
2 improvements.⁵

3 *** **

4 “To accommodate future improvements, as well as an associated
5 stormwater facility discussed earlier in this report, additional
6 right-of-way as described above must be dedicated along the
7 frontage of the site. Additionally, the applicant will be required to
8 sign street and storm sewer waivers of remonstrance (for
9 participation in future street and storm sewer improvements) prior
10 to final plat approval. *With those requirements, the width of the*
11 *right-of-way will be adequate to accommodate expected future*
12 *improvements and any users of those improvements.*

13 “With the conditions of approval described above, this criterion
14 [PCC 33.660.120(L) Services and Utilities] is met.” Record 6-8
15 (emphases in original).

16 The lynchpin of petitioner’s “lack of an essential nexus” argument is his
17 apparent position that the PCC 33.660.120.K transportation impacts criterion is
18 the *sole* authority for the city to require exactions that are based on impacts on
19 the transportation system. And petitioner apparently views the motor vehicle
20 trips that will be generated by the two new dwellings as the only impact on the
21 transportation system. Under that view, the city no longer had an approval
22 criterion upon which it might deny a permit application based on impacts on

⁵ As is explained in further detail below, before the hearings officer and during the open record period following the hearing, PBOT introduced analysis that concluded only the dedication of SE 122nd Drive was roughly proportional to petitioner’s proposed land division, and therefore proposed a modification to the condition of approval eliminating the requirement for dedication along SE 124th Avenue. Record 4; 65.

1 the transportation system, once it found that the PCC 33.660.120.K
2 transportation impacts criterion is satisfied without any required mitigation. In
3 other words, under that view of PCC 33.660.120.K, once that finding was
4 made, it became impossible for the disputed exaction to “substantially advance
5 the same government interest that would furnish a valid ground for denial of
6 the [proposed land division].” *Brown*, 251 Or App at 47.

7 Whatever facial or linguistic merit that argument might have, it ignores
8 the fact that the city for whatever reason chose to incorporate the PCC 33.654
9 rights-of-way requirements through the PCC 33.660.120.L services and utilities
10 criterion rather than the PCC 33.660.120.K transportation impacts criterion.
11 That choice, and the fact that right-of-way standards as a matter of function are
12 concerned in part with efficient traffic circulation, does not mean the exaction
13 in this case does not substantially advance the same government interest that
14 would furnish a valid ground for denial of the proposed land division, as
15 *Nollan* requires. It simply means the city applies the PCC 33.654 rights-of-way
16 requirements through the PCC 33.660.120.L services and utilities criterion
17 rather than the PCC 33.660.120.K transportation impacts criterion. The right-
18 of-way dedication and street improvement condition has the constitutionally
19 required nexus with the PCC 33.660.120.L services and utilities criterion and
20 the PCC 33.654 rights-of-way criteria.

21 Finally, at one point in the petition for review, citing *Brown*, petitioner
22 contends the city may not impose disputed exactions to address *future* traffic

1 impacts that are wholly unrelated to the disputed land division, even if that
2 exaction might further some general city policies. *Brown*, 251 Or App at 53.
3 But the traffic impacts cited in the rough proportionality analysis discussed
4 below are certainly not wholly unrelated to the disputed land division. The
5 hearings officer found that, as proposed, petitioner’s proposal *currently* does
6 not meet the city’s right-of-way design criterion (PCC 33.660.120(L)), which
7 incorporates requirements (PCC 33.654.120(B) & (C)) to construct
8 improvements to accommodate *expected* users of the right-of-way as a result of
9 the land division. As the city’s rights-of-way design criterion states, these
10 criteria are designed to “ensure that the vehicle, bicycle, and pedestrian
11 circulation system is designed be safe, efficient, and convenient.” PCC
12 33.654.120(A). To the extent petitioner contends the exaction was imposed to
13 address future impacts that are unrelated to the disputed land division, we reject
14 the contention.

15 This subassignment of error is denied.

16 **2. Rough Proportionality**

17 Once the city has established an adequate nexus to support the disputed
18 exaction, it must next establish that “the nature and extent of the exaction is
19 ‘roughly proportional’ to the effect of the proposed development.” *Brown*, 251
20 Or App at 47. “No precise mathematical calculation is required, but the city
21 must make some sort of individualized determination that the required
22 dedication is related both in nature and extent to the impact of the proposed

1 development.” *Dolan v. City of Tigard*, 512 US at 391 (footnote omitted). Here,
2 the hearings officer reviewed the city’s methodology, and determined the city
3 correctly concluded the right-of-way exactions imposed by the city satisfy the
4 rough proportionality test. Record 10-16. We agree with the hearings officer.

5 Petitioner objects to the rough proportionality analysis on the basis that it
6 constitutes “an attempt to appeal [the BDS] decision well after the appeal
7 period expired[.]” Petition for Review 23.⁶ The city disputes that
8 characterization of the rough proportionality analysis.

9 **a. Introduction of New Evidence Was Not Improper**

10 At the hearing, PBOT introduced a November 8, 2017 “Essential Nexus
11 and Rough Proportionality Analysis” (hereafter rough proportionality analysis)
12 that the hearings officer accepted, which supported the city’s proposal to
13 impose the disputed conditions of approval. Record 100-105. Petitioner had an
14 opportunity to respond to that rough proportionality analysis and did respond to
15 it. Record 125-36. As part of PBOT’s analysis, PBOT determined that the
16 required dedication of land to widen SE 122nd Drive was proportional to
17 petitioner’s proposal, but PBOT determined the required dedication of land to
18 widen SE 124th Avenue was not roughly proportional. As a result, the city

⁶ As explained later, petitioner’s improper appeal theory is based on the BDS decision that finds the transportation impacts criterion is met without mitigation. Petitioner appears to contend that the city’s rough proportionality analysis necessarily is inconsistent with that transportation impacts criterion finding and thus represents a belated appeal of that finding.

1 recommended, and the hearings officer adopted, a modified condition of
2 approval eliminating the requirement for dedication of right-of-way along SE
3 124th Avenue. Record 4.

4 According to ORS 197.195(5), limited land use decisions may be
5 approved through a notice and comment process and the city may provide a
6 right of local appeal. In the event of such an appeal, the appeal hearing may be
7 based on the existing administrative record or new evidence may be allowed.
8 Should an appeal hearing allow the introduction of new evidence, the hearing
9 is subject to the quasi-judicial hearing procedures set forth in ORS 197.763.
10 The city's Type IIx review is consistent with ORS 197.195(5). The city's Type
11 IIx appeal proceedings before the hearings officer are evidentiary hearings.
12 PCC 33.730.025(I)(6). *See* n 1. Thus, we agree with the city that the hearings
13 officer properly considered evidence and analysis that was presented at the
14 hearing by PBOT, as well as petitioner's response, and LUBA's review of the
15 hearings officer's decision includes the hearings officer's consideration of
16 these issues.

17 Petitioner's theory that the PBOT rough proportionality analysis
18 constitutes an improper, belated *de facto* appeal of its transportation impacts
19 criterion finding is based largely, if not entirely, on petitioner's premise that the
20 PCC 33.660.120.K transportation impacts criterion is the sole authority for the
21 city to exact dedications that have anything to do with traffic impact, and once
22 the city found the proposal complies with the PCC 33.660.120.K transportation

1 impacts criterion it was inconsistent for the city, in the rough proportionality
2 analysis, to take into consideration traffic that would be generated by the
3 development enabled by the land division. Because petitioner's premise is
4 faulty, his objection to the city's consideration of the rough proportionality
5 analysis is not well taken. The hearings officer committed no error in
6 considering the rough proportionality analysis introduced at the hearing.

7 **b. City's Rough Proportionality Analysis**

8 **i. Impact Determination**

9 First, the city determined the likely impacts of petitioner's proposed
10 development by analyzing the area along the route of travel to and from the
11 subject property and those portions of the transportation system that visitors
12 will use (the "Impact Area"). Record 102. The city recognized that there would
13 be impacts outside the impact area but limited its analysis to the impact area,
14 with the result that some impacts that might support the city's view of the
15 rough proportionality of the exaction were not considered.

16 Petitioner argues that the city did not find that petitioner's proposed land
17 division will generate impacts sufficient to require mitigation, and therefore it
18 improperly "invented" sub-impacts to justify the proposed dedication
19 conditions of approval.⁷ Petition for Review 24. We do not understand
20 petitioner's argument. While the hearings officer does mention some difficulty

⁷ Those sub-impacts included street infrastructure wear and tear, pollution and safety. Record 150.

1 in quantifying potential sub-impacts, the clear focus of the PBOT analysis and
2 the hearings officer’s decision was the trips that will be generated by the new
3 dwellings made possible by the disputed land division.

4 The hearings officer noted that:

5 “The primary metric the City uses to determine the potential
6 impacts of a development proposal is motor vehicle trip
7 generation, with estimates provided by the Institute of
8 Transportation Engineers (‘ITE’) Trip Generation Manual. A
9 development can impact its surroundings in a number of ways
10 unrelated to motor vehicle trips, both during and after
11 construction. A new house can place new burdens on the
12 environment, utilities, and neighborhood livability and aesthetics.
13 A consideration of those impacts is appropriate. As the Oregon
14 Court of Appeals has explained, ‘rough proportionality’ is not
15 restricted to considering the impacts of a single, particular use of
16 the site when the development application, as approved, allows a
17 range of uses reasonably generating a variety of impacts.’
18 *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 193 Or
19 App 24, 37, 88 P3d 284 (2004).

20 “However, many of those burdens are difficult to quantify,
21 meaning the public inevitably subsidizes all development by
22 absorbing a number of impacts for which direct mitigation is
23 impracticable.

24 “Motor vehicle trip generation, by contrast, is a quantifiable, if
25 incomplete, measurement and, if its sub-impacts are included, it
26 can justify a number of reasonable mitigation measures. * * *”
27 Record 11-12.⁸

⁸ The hearings officer’s “sub-impacts” terminology unnecessarily complicates the analysis and his reference to the dedications required to comply with the rights-of-way requirements as “mitigation measures” further complicates the analysis, since he earlier found no mitigation measures were required to satisfy the transportation impacts criterion. However, we do not

1 As the hearings officer explained, all new development generates
2 burdens, which the city refers to as “sub-impacts,” including street
3 infrastructure wear and tear, pollution, and safety, which may not be readily
4 quantifiable. Record 11-12. Nonetheless, we agree with the city that these types
5 of impacts may be considered in conjunction with the quantifiable motor
6 vehicle trip generation analysis which the city performed. Because we have
7 already determined an essential nexus exists between the city’s rights-of-way
8 dedication conditions of approval and petitioner’s proposed project, we find no
9 error in the city’s impact determination.

10 This subassignment of error is denied.

11 **ii. The City’s Calculations**

12 Next, based on the Institute of Transportation Engineers (“ITE”) Trip
13 Generation Manual, the city adopted the following calculation:

14 “The development will add approximately 19 new daily motor
15 vehicle trips with their associated sub-impacts, to the Impact Area.
16 The existing home and two additional homes are proposed to have
17 motor vehicle access only to SE 122nd Drive. Due to this fact,
18 100% of these trips will use [SE 122nd Drive], which is paved, and
19 0% of these trips will use [SE 124th Avenue], which acts as a
20 driveway for the adjacent two properties to the west.” Record 103.

21 Next, to determine the percentage increase in traffic in the Impact Area
22 those 19 new daily trips would represent, the city first determined the number
23 of existing residences with access to SE 122nd Drive:

consider the hearings officer’s imprecise wording to be the fatal flaw that
petitioner believes it is.

1 “The Average Daily Traffic (ADT) along the two (2) frontage
2 streets was determined by taking the number of existing SFR
3 [single family residences] that have motor vehicle access to these
4 frontage streets and multiplying it by the ITE daily trip rate for
5 Single-Family Detached Housing. It was determined through
6 aerial imagery that 37 SFR currently have motor vehicle access to
7 SE 122nd Drive* * *.” Record 103.

8 Based on that determination, the city found the average daily traffic on
9 SE 122nd Drive was 352 trips. Record 103. As a result, the city concluded the
10 petitioner’s development proposal is expected to increase the number of motor
11 vehicle trips in the Impact Area by five percent on SE 122nd Drive.⁹ Record
12 103-04.

13 Finally, based upon the percentage of total trips that can be attributed to
14 the proposed development, to determine whether the city’s proposed conditions
15 of approval were roughly proportional, the city considered the area of the
16 property dedication in proportion to the area of the property, comparing it to
17 the area needed to allow for street and storm water improvements. Record 104-
18 105. Here, the city determined that along SE 122nd Drive, the dedication to
19 allow for street and stormwater improvements is approximately 2.6 percent of
20 the property.¹⁰ The hearings officer reviewed these calculations and found that

⁹ The percentage increase was calculated by dividing site trips by average daily traffic. Accordingly, the city determined the dedication for SE 122nd Drive (19/352) equals five percent. Record 104.

¹⁰ The city calculated 2.6 percent dedication based upon the total site area and the required dedication widths (or average of widths if multiple widths were identified). Based upon an average dedication to allow for street and

1 the city's imposition of a 2.6 percent dedication was less than the projected five
2 percent of estimated increase in vehicle trips assigned to the petitioner's project
3 and was therefore roughly proportional. Record 105.

4 Before the hearings officer, petitioner argued that the city's analysis was
5 incorrect because the dedication would amount to 4.1 percent of the property,
6 not 2.6 percent.¹¹ Record 15. However, even under petitioner's 4.1 percent
7 assumption, the hearings officer found that a 4.1 percent dedication was less
8 than the estimated five percent estimated increase in vehicle trips attributed to
9 petitioner's proposal. *Id.*

10 The city's decision to compare the percentage of total trips in the area
11 that can be attributed to the proposal and the exaction's percentage of the total
12 area of the subject property can be accused of comparing apples and oranges.
13 That accusation is possible in most cases where a *Dolan* rough proportionality
14 analysis is required. *See McClure v. City of Springfield*, 39 Or LUBA 329, 350-

storm water improvements between two and seven feet, the city used an average 4.5 feet dedication. The property frontage along SE 122nd Drive is 265 feet. 265 feet x 4.5 feet equals 1,193 square feet. The existing site area equals 46,315 square feet. Therefore, the site dedication ratio for SE 122nd Drive is 1,193 square feet (exaction area) / 46,315 square feet (site area) equals 2.6 percent. Record 105.

¹¹ Petitioner argued that the city erred in using an average of dedication widths and argued (1) because the dedication width was seven feet in some areas, (2) that the street frontage is 270 feet, (3) that the dedication required by the city was 1,890 square feet (7 x 270 feet), and (4) therefore the site dedication percentage for SE 122nd Drive is 4.1 percent (1,890 square feet (exaction area) / 46,315 square feet (site area)).

1 52 (2001) (Holstun, Board Member, concurring) (“The central problem under
2 *Dolan’s* rough proportionality test is that the things that must be shown to be
3 roughly proportional in *extent* (exactions and impacts) are different kinds of
4 things.”) (footnote omitted.) The bulk of petitioner’s challenge to the rough
5 proportionality analysis is to the city’s recitation of unquantified “sub-
6 impacts.” *See* n 8. We do not understand petitioner to contend it was improper
7 for the city to compare the percentage of the property subject to the exaction
8 and the percentage of total motor vehicle trips in the area that will be generated
9 by the proposal. If that is petitioner’s argument it is not sufficiently developed
10 for review. Again, petitioner’s recurring complaint is that once the city found
11 the transportation impact criterion was satisfied without requiring mitigation
12 the city lost the ability to consider the motor vehicle trips the proposal will
13 generate in its rough proportionality analysis to support the exaction under the
14 city’s rights-of-way standards. We have already rejected that argument.

15 This subassignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the hearings officer misconstrued applicable law
18 when he concluded that the city correctly determined a waiver of remonstrance
19 regarding future improvements in the right-of-way adjacent to petitioner’s land
20 division was required as a condition of approval. ORS 197.835(9)(D). Further,
21 petitioner argues the hearings officer’s imposition of that condition of approval
22 is not supported by substantial evidence in the whole record. ORS

1 197.835(9)(C). In response, the city argues the hearings officer reasonably and
2 correctly adopted a condition of approval requiring a waiver of remonstrance
3 regarding future improvements in the right-of-way adjacent to petitioner's land
4 division. We agree with the city.

5 Under the second assignment of error, petitioner challenges the
6 following condition of approval, adopted by the hearings officer:

7 "1. The applicant shall complete street and storm sewer waivers
8 of remonstrance (for future street and storm sewer improvements)
9 as required by the City Engineer. Waiver forms and instructions
10 will be provided to the Applicant during the final plat review
11 process." Record 21.

12 Conditions of approval may be applied to ensure that a development
13 proposal conforms to the applicable approval criteria or to ensure the
14 enforcement of other city regulations. PCC 33.800.070. As relevant here, PCC
15 33.10.030(B) provides:

16 "B. **Clarification for rights-of-way.** Land within private rights-
17 of-way, including rail rights-of-way and utility rights-of-
18 way, is regulated by Title 33. Land within public rights-of-
19 way is regulated by Title 17, Public Improvements, and not
20 by Title 33, except in the following situations where both
21 Titles apply:

22 " * * *

23 "2. The act of creating or dedication public rights-of-way
24 through a land division[.]"

25 As explained above, PCC 33.660.120 sets forth the conditions of
26 approval required for land divisions. PCC 33.660.120(L) requires that the
27 regulations and criteria of Chapter PCC 33.654, addressing services and

1 utilities, must be met. PCC 33.654.120(C) requires that the public right-of-way
2 adjacent to petitioner's proposed land division be sufficient in width to
3 accommodate expected users and to comply with PBOT's approved standards.
4 Projects, including those that propose a land division, must provide for
5 standard full-width improvements, as determined by PBOT. 17.88.020(B).¹²
6 Rather than require petitioner to construct the improvements to comply with
7 the applicable rights-of-way criteria, the hearings officer concluded the city's
8 requirement that petitioner sign a waiver of remonstrance was appropriate.
9 Record 17. As PBOT explained:

¹² PCC 17.88.020, in relevant part, provides:

- "A. No single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants, or make significant alterations to a building without resulting in increased occupancy, on property that does not have direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic.
- "B. If a street adjacent to a property described in Subsection A. above does not have a standard full-width improvement, including sidewalks, the owner, as a condition of obtaining a building permit, conditional use, zone change, land partition or adjustment, shall provide for such an improvement or a portion thereof as a designated by the Director of the Bureau of Transportation [PBOT] in accordance with provisions elsewhere in this Title. The payment of a [LTIC] will satisfy the requirements of this Subsection." (Emphasis added.)

1 “A waiver of remonstrance is used to gauge the level of support a
2 potential [local improvement district] LID will receive. Waivers
3 are not an assessment of fees toward an LID. The first step
4 [PBOT] takes is to provide City Council with a resolution to
5 initiate an LID. After this step, a survey is sent to all propriet[y]
6 owners who may potentially be included in a[n] LID boundary,
7 including properties with existing, recorded waivers.

8 “If a majority of property owner support can be achieved, the LID
9 Coordinator then takes an LID formation ordinance to City
10 Council. It is during this formation process that assessments are
11 determined for each property owner. The LID Coordinator then
12 takes an assessment ordinance to City Council to identify the final
13 assessment for each property owner with the boundary of the
14 LID.” Record 123-24.

15 The hearings officer agreed with the city’s conclusion that pursuant to
16 PCC 33.654.120(B) and (C):

17 “To accommodate future improvements, as well as an associated
18 stormwater facility * * * additional right-of-way * * * must be
19 dedicated along [SE 122nd Drive]. Additionally, the applicant will
20 be required to sign street and storm sewer waivers of remonstrance
21 (for participation in future street and storm sewer improvements)
22 prior to final plat approval. With those requirements, the width of
23 the right-of-way will be adequate to accommodate expected future
24 improvements and any users of those improvements.

25 “With those conditions of approval described above, this criterion
26 [PCC 33.654.120(B) and (C)] is met.” Record 55.

27 A waiver of remonstrance to the formation of a local improvement
28 district (LID) is not subject to a constitutional exaction analysis because it, by
29 itself, does not result in a loss of petitioner’s property. *McClure*, 39 Or LUBA
30 at 350. Where there is substantial evidence in the record to justify a city’s
31 finding that there is a need for a local improvement district and that petitioner’s

1 development will both contribute to the need for those improvements and be
2 benefited by them, the city may require petitioner to sign a waiver of
3 remonstrance for future street improvements. *Clark v. City of Albany*, 31 Or
4 LUBA 375, 380, *aff'd* 144 Or App 192, 924 P2d 877 (1996).

5 We agree with the city that there is substantial evidence in the record to
6 support the city's finding that petitioner's proposed development will both
7 contribute to the need for an LID, and be benefited by an LID, if one is
8 proposed. The city has provided substantial evidence that impacts to services
9 and utilities associated with petitioner's proposed land division exist, with
10 which the additional right-of-way conditions of approval have a substantial
11 nexus. With those dedication requirements, the width of the right-of-way
12 required by the city will be adequate to accommodate expected future
13 improvements and any users of those improvements. As the city points out,
14 only if an LID is formed will the city perform its calculations as to the extent to
15 which properties within the proposed LID will be benefited, and at that time
16 petitioner may challenge those specific findings. Until that time, petitioner has
17 established no basis for relief.

18 The second assignment of error is denied.

19 The city's decision is affirmed.