

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

3
4 JOHN T. DOLAN and FLORENCE DOLAN,)
5)
6 Petitioners,)
7) LUBA No. 91-161
8 vs.)
9) FINAL OPINION
10 CITY OF TIGARD,) AND ORDER
11)
12 Respondent.)

13
14
15 Appeal from City of Tigard.

16
17 Joseph R. Mendez, Portland, filed the petition for
18 review and argued on behalf of petitioners. With him on the
19 brief was Knappenberger & Mendez.

20
21 James M. Coleman, Portland, filed the response brief
22 and argued on behalf of respondent. With him on the brief
23 was O'Donnell, Ramis, Crew & Corrigan.

24
25 David B. Smith, Tigard, filed a brief and argued on
26 behalf of amicus Oregonians in Action.

27
28 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
29 Referee, participated in the decision.

30
31 AFFIRMED 02/07/92

32
33 You are entitled to judicial review of this Order.
34 Judicial review is governed by the provisions of ORS
35 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council resolution granting
4 site development review approval for construction of a
5 retail sales building, but denying variances to Tigard
6 Community Development Code (TCDC) provisions requiring
7 dedication of land for a greenway and a pedestrian/bicycle
8 pathway and prohibiting roof signs.¹

9 **FACTS**

10 Petitioners appealed a previous city decision granting
11 site development review approval for construction of the
12 proposed retail sales building, and imposing conditions
13 requiring greenway and pedestrian/bicycle pathway
14 dedications and roof sign removal. In our opinion in that
15 appeal, Dolan v. City of Tigard, ___ Or LUBA ___ (LUBA No,
16 90-029, January 24, 1991) (Dolan I), slip op 2-3, we set out
17 the following relevant facts:

18 "Petitioners own a 1.67 acre parcel in downtown
19 Tigard which is designated Central Business
20 District on the Tigard Comprehensive Plan (plan)
21 map and is zoned Central Business District -
22 Action Area (CBD-AA). A 9,700 square foot retail
23 sales building, occupied by an electric and
24 plumbing supply business also owned by
25 petitioners, is located on the eastern edge of the
26 subject parcel. The structure includes a large

¹The challenged decision also approves a variance to applicable TCDC parking requirements for general retail sale businesses, allowing provision of only 39, rather than 44, parking spaces. However, this portion of the decision is not at issue in this appeal.

1 roof sign, and is adjoined by a partially paved
2 parking lot. Fanno Creek flows through the
3 southwestern corner of the subject parcel and
4 along its western boundary.

5 "Petitioners applied to the city for site
6 development review approval to replace the
7 existing building with a 17,600 square foot retail
8 sales building constructed on the western portion
9 of the subject parcel.† * * *"
10

11 † "Petitioners proposed to demolish the existing 9,700 square
12 foot building after the new building was completed and the
13 electric and plumbing supply business moved into it."

14 In Dolan I, we affirmed the challenged city decision.
15 Specifically, we held petitioners' claims that the
16 conditions of approval requiring dedication of portions of
17 their property for a greenway and a pedestrian/bicycle
18 pathway constituted an unconstitutional "taking" under both
19 the United States and Oregon Constitutions were not "ripe"
20 for review, because petitioners had not sought relief
21 through the variance process provided by TCDC
22 Chapter 18.134. Id., slip op at 21. We also rejected
23 petitioners' claim that the condition requiring removal of
24 the existing roof sign within 45 days of the issuance of an
25 occupancy permit for the new building was unreasonable and a
26 "denial of due process," because petitioners did not support
27 this constitutional claim with legal argument. Id., slip op
28 at 22.

29 On March 28, 1991, petitioners submitted a new site
30 development review application for the proposed retail sales
31 building to the city, including requests for variances from

1 TCDC 18.120.180.A.8,² 18.86.040.A.1.b³ and 18.114.070.H.⁴
2 On September 17, 1991, the city council adopted the
3 challenged resolution approving site development review, but
4 denying the requested variances. The city's decision
5 includes the following relevant conditions:

6 "1. The applicant shall dedicate to the City as
7 Greenway all portions of the site that fall

²TCDC 18.120.180.A.8 establishes the following standard for site development review approval:

"Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan."

³TCDC 18.86.040.A.1 provides in relevant part:

"The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

"* * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. * * *

"* * * * *"

⁴TCDC 18.114.070.H prohibits "roof signs of any kind." There is confusion in the record as to whether petitioners really sought a variance to this provision, or rather sought to convince the city that the sign in question is not actually a "roof sign." See Record 9, 27, 160.

1 within the existing 100-year floodplain [of
2 Fanno Creek] (i.e., all portions of the
3 property below elevation 150.0) and all
4 property 15 feet above (to the east of) the
5 150.0 foot floodplain boundary. The building
6 shall be designed so as not to intrude into
7 the greenway area. * * *"⁵ Record 31-32.

8 "15. The existing roof sign shall be permanently
9 removed from the subject property within 45
10 days of the issuance of the Occupancy Permit
11 for the new building."⁶ Record 34.

12 **FIRST ASSIGNMENT OF ERROR**

13 "The City's decision to demand the dedication to
14 the City of those portions of Petitioners' land
15 lying 15 feet to the east of the 100-year flood
16 plain boundary constitutes an unlawful taking in
17 violation of Petitioners' rights under the Oregon
18 and United States Constitutions."

19 **SECOND ASSIGNMENT OF ERROR**

20 "The City Council's exaction of all portions of
21 Petitioners' property falling within the 100-year
22 flood plain constitutes an unlawful taking of
23 private property for public use, in violation of
24 the Oregon and United States Constitutions."⁷

⁵The dedications required by this condition comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 159.

⁶Conditions 1 and 15 are virtually identical to conditions included in the site design review approval decision challenged in Dolan I. See Dolan I, slip op at 3.

⁷The brief of amicus Oregonians in Action includes an assignment of error which states essentially the same allegations as petitioners' first and second assignments of error. The purpose of amicus participation is to aid this Board in its review of relevant issues. OAR 661-10-052(1). We consider amicus' arguments to the extent they are relevant to the issues raised by petitioners' assignments of error.

1 **A. Introduction**

2 In the first and second assignments of error,
3 petitioners challenge the validity of the condition imposed
4 by the city requiring petitioners to dedicate to the city
5 the portions of the subject parcel within the 100-year flood
6 plain of Fanno Creek and within 15 feet to the east of the
7 flood plain boundary. Petitioners argue that this condition
8 of site development review approval constitutes a taking,
9 without just compensation, of the 7,000 square feet of their
10 parcel required to be dedicated for public use, in violation
11 of the Fifth Amendment to the United States Constitution and
12 Article I, Section 18 of the Oregon Constitution.
13 Petitioners ask that we either reverse the city's imposition
14 of this condition or remand the decision to the city with
15 instructions to remove the condition.

16 Petitioners do not contend that establishing a greenway
17 in the floodplain of Fanno Creek for storm water management
18 purposes, and providing a pedestrian/bicycle pathway system
19 as an alternative means of transportation, are not
20 legitimate public purposes. Further, petitioners do not
21 challenge the sufficiency of the "nexus" between these
22 legitimate public purposes and the condition imposed
23 requiring dedication of portions of petitioners' property
24 for the greenway and pedestrian/bicycle pathway. Rather,
25 petitioners' contention is that under both the federal and
26 Oregon Constitutions, the relationships between the impacts

1 of the proposed development and the exactions imposed are
2 insufficient to justify requiring dedication of petitioners'
3 property without compensation.

4 The challenged decision includes the following findings
5 addressing the impacts of the proposed development and the
6 relationship between the impacts of the proposed development
7 and the required dedication of land for greenway and
8 pedestrian/bicycle pathway purposes:

9 "The * * * requirements for dedication of the area
10 adjacent to the floodplain for greenway purposes
11 and for construction of a pedestrian/bicycle
12 pathway [do not] constitute a taking of the
13 applicant's property. [T]he dedication and
14 pathway construction are reasonably related to the
15 applicant's request to intensify the development
16 of this site with a general retail sales use, at
17 first, and other uses to be added later. It is
18 reasonable to assume that customers and employees
19 of the future uses of this site could utilize a
20 pedestrian/bicycle pathway adjacent to this
21 development for their transportation and
22 recreation needs. In fact, the site plan has
23 provided for bicycle parking in a rack in front of
24 the proposed building to provide for the needs of
25 the facility's customers and employees. It is
26 reasonable to expect that some of the users of the
27 bicycle parking provided for by the site plan will
28 use the pathway adjacent to Fanno Creek if it is
29 constructed. In addition, the proposed expanded
30 use of this site is anticipated to generate
31 additional vehicular traffic thereby increasing
32 congestion on nearby collector and arterial
33 streets. Creation of a convenient, safe
34 pedestrian/ bicycle pathway system as an
35 alternative means of transportation could offset
36 some of the traffic demand on these nearby streets
37 and lessen the increase in traffic congestion."
38 Record 20.

39 "The * * * requirements for dedication of the area

1 within the floodplain of Fanno Creek for storm
2 water management and greenway purposes [do not
3 constitute] a taking of the applicant's property.
4 [T]he required dedication [is] reasonably related
5 to the applicant's request to intensify the usage
6 of this site, thereby increasing the site's
7 impervious area. The increased impervious surface
8 would be expected to increase the amount of storm
9 water runoff from the site to Fanno Creek. The
10 Fanno Creek drainage basin has experienced rapid
11 urbanization over the past 30 years causing a
12 significant increase in stream flows after periods
13 of precipitation. The anticipated increased storm
14 water flow from the subject property to an already
15 strained creek and drainage basin can only add to
16 the public need to manage the stream channel and
17 floodplain for drainage purposes. Because the
18 proposed development's storm drainage would add to
19 the need for public management of the Fanno Creek
20 floodplain, * * * the requirement of dedication of
21 the floodplain area on the site is related to the
22 applicant's plan to intensify development on the
23 site." Record 28.

24 Petitioners generally argue under these assignments of
25 error that the proposed development is "in no way related
26 to" or "not related to" the challenged dedication
27 requirement. Petition for Review 11, 14. However,
28 petitioners do not challenge the adequacy of the above
29 quoted findings or their evidentiary support in the record.
30 Therefore, for purposes of evaluating petitioners'
31 constitutional taking claims, we assume that the facts found
32 by the city concerning the impacts of the proposed
33 development and the need for storm water management and
34 alternative means of transportation are valid, and consider
35 only whether these facts are legally sufficient to establish
36 the requisite relationship between the impacts of the

1 proposed development and the exaction imposed.

2 **B. Oregon Taking Claim**

3 Article 1, Section 18 of the Oregon Constitution
4 provides in relevant part:

5 "Private property shall not be taken for public
6 use * * * without just compensation * * *."

7 Petitioners contend the Oregon Supreme Court has never
8 articulated a standard for applying Article I, Section 18 of
9 the Oregon Constitution to conditions of development
10 approval which constitute a physical taking, such as a
11 condition requiring dedication of land. Petitioners argue,
12 however, that we should apply the "reasonable relationship"
13 standard previously used by the Court of Appeals and this
14 Board in other contexts to determine the validity of
15 development exactions. Hayes v. City of Albany, 7 Or App
16 277, 285, 490 P2d 1018 (1971); O'Keefe v. City of West Linn,
17 14 Or LUBA 284, 293 (1986). Petitioners contend there is no
18 "reasonable relationship" between the disputed condition
19 requiring dedication of a portion of their property for a
20 greenway and a pedestrian/bicycle pathway and the impacts of
21 the proposed development.

22 We agree with petitioners that Article I, Section 18,
23 of the Oregon Constitution requires that there be a
24 "reasonable relationship" between the challenged condition
25 and the impacts of or needs generated by the proposed
26 development. For the reasons stated in the following
27 subsection of this opinion, we find such a "reasonable

1 relationship" exists.

2 This subassignment of error is denied.

3 **C. Federal Taking Claim**

4 The Fifth Amendment to the United States Constitution,
5 made applicable to states and local governments through the
6 Due Process Clause of the Fourteenth Amendment, provides in
7 relevant part:

8 "[N]or shall private property be taken for public
9 use, without just compensation."

10 Both petitioners' and amicus' arguments rely heavily on
11 the opinion of the United States Supreme Court in Nollan v.
12 California Coastal Com'n, 483 US 825, 107 S Ct 3141, 97
13 L Ed2d 677 (1987) (Nollan). Prior to Nollan, it had been
14 established by most courts, including the federal courts of
15 this circuit, that a development exaction must have a
16 "reasonable relationship" to the impacts of, or needs
17 created by, the proposed development.⁸ See e.g., Parks v.
18 Watson, 716 F2d 646, 653 (9th Cir 1983). Petitioners and
19 amicus argue that under Nollan, something more than a
20 "reasonable relationship" between the impacts of the
21 proposed development and the required exaction is necessary
22 to avoid an unconstitutional taking. Petitioners and amicus

⁸The "reasonable relationship" standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be "specifically and uniquely attributable" to the proposed development, or that a development exaction merely have "some relationship" to the proposed development. Parks v. Watson, supra.

1 variously describe the closer relationship required as a
2 "clear match," an "essential nexus" or a "substantial
3 relationship." Petition for Review 11; Amicus Brief 9, 11.
4 Petitioners and amicus further argue that the dedication
5 required by the challenged condition is clearly intended to
6 secure benefits for the general public and is not even
7 reasonably related to any hypothetical impacts on storm
8 water drainage and traffic due to the proposed development.

9 Respondent contends Nollan does not require that there
10 be a closer relationship between the impacts of a proposed
11 development and the extent of exactions imposed. According
12 to respondent, the closer relationship required by Nollan is
13 that there be an "essential nexus" between the legitimate
14 public purpose pursued and the nature of the exaction
15 imposed as a condition of development approval. Respondent
16 also argues that in Commercial Builders v. Sacramento, 941
17 F2d 872 (9th Cir 1991), the court considered the impact of
18 Nollan with regard to this issue and stated:

19 "* * * Nollan does not stand for the proposition
20 that an exaction * * * will be upheld only where
21 it can be shown that the development is directly
22 responsible for the social ill in question.
23 Rather, Nollan holds that where there is no
24 evidence of a nexus between the development and
25 the problem that the exaction seeks to address,
26 the exaction cannot be upheld. * * *" (Emphasis
27 added.) Commercial Builders v. Sacramento, supra,
28 941 F2d at 875.

29 Respondent contends all that is required is a
30 "reasonable relationship" between the impacts of the

1 proposed development and the exaction imposed by the
2 challenged condition. With regard to the required
3 dedication of land within the floodplain of Fanno Creek for
4 a greenway, respondent argues that the city's adopted Master
5 Drainage Plan indicates the Fanno Creek greenway is an
6 essential part of the city's program for storm water
7 management. Respondent further argues the city's undisputed
8 findings establish that the proposed development, which
9 includes a larger building and paved parking lot, will
10 increase the amount of impervious surface on the site and,
11 therefore, will increase storm water runoff from the site.
12 According to respondent, this is sufficient to establish a
13 "reasonable relationship" between the proposed development
14 and the dedication required.

15 With regard to the required dedication of land adjacent
16 to the floodplain of Fanno Creek for a pedestrian/bicycle
17 pathway, respondent argues the city's adopted Comprehensive
18 Pedestrian/ Bicycle Pathway Plan designates a continuous
19 network of pedestrian/bicycle pathways throughout the city,
20 and includes a pedestrian/bicycle pathway along the Fanno
21 Creek greenway on the subject property. Respondent further
22 argues the city's undisputed findings indicate the proposed
23 development of a larger retail establishment on the subject
24 property will result in greater numbers of employees and
25 customers, and that the expansion will generate additional
26 vehicular traffic, increasing congestion on nearby streets.

1 According to respondent, there is a "reasonable
2 relationship" between such impacts and requiring dedication
3 of land to construct a segment of a planned
4 pedestrian/bicycle pathway network.

5 In Nollan, owners of beachfront property seeking a
6 permit to build a larger house on their lot challenged the
7 constitutionality of a condition imposed by the California
8 Coastal Commission requiring that they give the public an
9 easement to pass laterally across their property from one
10 neighboring beach to another. Nollan addresses primarily
11 the necessary relationship between the legitimate state
12 purpose for which a development application could be denied
13 (in Nollan, primarily the commission's duty to protect the
14 public's ability to view the beach from the upland) and the
15 condition imposed (easement allowing the public lateral
16 access along the beach, to pass across the Nollan's property
17 from one adjoining beach to another). The Supreme Court
18 found a required "essential nexus" between the state purpose
19 and the condition was lacking.⁹ Nollan, 483 US at 837.

20 The Supreme Court next turned to the Commission's
21 argument that its condition nevertheless did not constitute
22 a taking because it was "reasonably related to the public

⁹However, as we point out supra, in this case the relationship between the city's legitimate public purposes (providing for storm water management and an adequate transportation system) and the condition imposed (dedication of land for a greenway and pedestrian/bicycle pathway) is not disputed.

1 need or burden that the [larger] house creates or to which
2 it contributes." Id. at 438. The Supreme Court stated:

3 "* * * We can accept, for purposes of discussion,
4 the Commission's proposed test as to how close a
5 'fit' between the condition and burden is
6 required, because we find that this case does not
7 meet even the most untailed standards. * * *"
8 Id.

9 The Supreme Court proceeded to conclude that the condition
10 imposed in Nollan constituted an unconstitutional taking
11 because there was no relationship between it and the impacts
12 of the proposed development. We, therefore, agree with
13 respondent and the Ninth Circuit Court of Appeals' statement
14 in Commercial Builders v. Sacramento, supra, that Nollan
15 does not establish a new, stricter standard for the
16 relationship required between the impacts or burdens of a
17 proposed development and exactions imposed as conditions of
18 development approval.

19 Thus, we agree with respondent that the challenged
20 condition requiring dedication of portions of petitioners'
21 property is not an unconstitutional taking if it has a
22 "reasonable relationship" to the impacts of or needs
23 generated by the proposed development. To the extent
24 petitioners suggest the city is required to establish a
25 numerical relationship between the increase in runoff due to
26 the proposed development and the amount of land dedicated
27 for the greenway, or that the land dedicated for the
28 greenway will not also accommodate increased upstream

1 discharges, we disagree. In view of the comprehensive
2 Master Drainage Plan adopted by respondent providing for use
3 of the Fanno Creek greenway in management of storm water
4 runoff, and the undisputed fact that the proposed larger
5 building and paved parking area on the subject property will
6 increase the amount of impervious surfaces and, therefore,
7 runoff into Fanno Creek, we conclude there is a "reasonable
8 relationship" between the proposed development and the
9 requirement to dedicate land along Fanno Creek for a
10 greenway.

11 Furthermore, the city has adopted a Comprehensive
12 Pedestrian/Bicycle Pathway Plan which provides for a
13 continuous network of pedestrian/bicycle pathways as part of
14 the city's plans for an adequate transportation system. The
15 proposed pedestrian/bicycle pathway segment along the Fanno
16 Creek greenway on the subject property is a link in that
17 network. Petitioners propose to construct a significantly
18 larger retail sales building and parking lot, which will
19 accommodate larger numbers of customers and employees and
20 their vehicles. There is a reasonable relationship between
21 alleviating these impacts of the development and
22 facilitating the provision of a pedestrian/bicycle pathway
23 as an alternative means of transportation.

24 We, therefore, conclude the challenged condition
25 requiring dedication of portions of petitioners' property is
26 not an unconstitutional taking in violation of the Fifth and

1 Fourteenth Amendments to the United States Constitution.

2 This subassignment of error is denied.

3 The first and second assignments of error are denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 "The City has characterized an existing wall sign
6 as a 'roof sign.' By mischaracterizing the sign,
7 the City then establishes a requirement that the
8 sign be removed within 45 days of occupancy of the
9 new building which is unreasonable and hence a
10 denial of due process."

11 Petitioners argue the "roof sign" on the existing
12 building which is required to be removed by condition 15 is
13 actually "part of a parapet wall constructed on the existing
14 building in order to join three small buildings into one
15 structure and hide unsightly roof lines." Petition for
16 Review 16. Petitioners also argue that the sign in question
17 is an integral part of the existing building, and that it is
18 unreasonable for the city to require them to remove it
19 within 45 days of obtaining an occupancy permit for the new
20 building.

21 Whether the sign in question is correctly characterized
22 as a "roof sign" is of no importance to resolution of this
23 assignment of error. Petitioners do not contend the
24 challenged condition would be impermissible if the sign were
25 other than a "roof sign." Rather, petitioners contend the
26 condition is impermissible because the amount of time
27 allowed for them to remove the sign is "unreasonable and
28 hence a denial of due process."

1 In response to the same argument by petitioners in
2 Dolan I, we stated:

3 " * * * Petitioners presumably intend this phrase
4 to indicate that the city's decision is
5 unconstitutional in some way and, therefore,
6 subject to reversal or remand under
7 ORS 197.835(7)(a)(E). However, no argument
8 supporting an allegation of unconstitutionality is
9 provided in the petition for review. This Board
10 has consistently declined to consider claims of
11 constitutional violations where, as here, they are
12 unsupported by legal argument. Van Sant v.
13 Yamhill County, 17 Or LUBA 563, 566-67 (1989);
14 Faulkender v. Hood River County, 17 Or LUBA 360,
15 366 (1989); Portland Oil Service Co. v. City of
16 Beaverton, 16 Or LUBA 255, 269 (1987); Chemeketa
17 Industries Corp. v. City of Salem, 14 Or LUBA 159,
18 165-166 (1985)." Dolan I, slip op at 22

19 Petitioners still do not provide any legal argument in
20 support of their allegation of unconstitutionality with
21 regard to the time limit for removal of the "roof sign."

22 The third assignment of error is denied.

23 The city's decision is affirmed.