

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WILLIAM F. CLARK,)
5))
6 Petitioner,)
7) LUBA No. 94-229
8 vs.)
9) FINAL OPINION
10 CITY OF ALBANY,) AND ORDER
11))
12 Respondent.)
13
14

15 Appeal from City of Albany
16

17 Edward F. Schultz, Albany, filed the petition for
18 review and argued on behalf of petitioner. With him on the
19 brief was Weatherford, Thompson, Quick & Ashenfelter, P. C.
20

21 James V. B. Delapoer, Albany, filed the response brief
22 and argued on behalf of respondent. With him on the brief
23 was Long, Delapoer, Healy & McCann, P.C.
24

25 LIVINGSTON, Referee; SHERTON, Chief Referee; GUSTAFSON,
26 Referee, participated in the decision.
27

28 REMANDED 06/16/95
29

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a limited land use decision by the
4 city planning staff approving a site plan with conditions.

5 **FACTS**

6 **A. The Proposal**

7 Petitioner proposes to locate a fast food drive-in
8 restaurant on property zoned Heavy Commercial. Spicer Road,
9 a county road that runs east-west and is not improved to
10 city standards, adjoins the property to the north and
11 intersects the Santiam Highway at a point about 200 feet
12 from the western boundary of the property. Fescue Street,
13 which runs north-south, ends as a public right-of-way at a
14 point about 400 feet south of the subject property.¹ Fescue
15 Street continues as a private easement to the west of the
16 property. The city's master street plan shows Fescue Street
17 as extending either through or near the property.

18 Petitioner's site plan shows a strip 25 feet wide,
19 running north-south along the western boundary of the
20 subject property, denominated as part of the Fescue Street
21 right-of-way. A 12-inch storm drain and a 12-inch water
22 line run parallel to and south of Spicer Road. A 6-inch
23 storm drain runs north-south through the subject property
24 near the western edge of the Fescue Street right-of-way.

¹These distances are rough estimates based on maps in the record. The exact number of feet is not important.

1 **B. Procedural History**

2 On August 8, 1994, petitioner and his attorney attended
3 a pre-application conference with city planning staff to
4 discuss various issues, including storm drainage, a sewer
5 line extension, a partial street improvement to Spicer Road,
6 and a redesign of Spicer Road. Petitioner filed a site plan
7 application on September 23, 1994. As required by ORS
8 197.195(3)(c), the city provided notice of the application
9 and an opportunity to submit written comments to petitioner
10 and neighboring property owners.² Petitioner did not file
11 written comments.

12 The city gave notice of its decision on November 2,
13 1994. Petitioner filed a notice of intent to appeal to
14 this Board on November 23, 1994. On December 16, 1994, this
15 Board issued an order granting the city's motion for a
16 continuance and stay to allow additional time for the
17 parties to explore settlement and compromise. On January 5,
18 1995, after petitioner moved to terminate the stay, the city

²ORS 197.195(3)(c) states:

"The notice and procedures used by local government shall:

"(A) Provide a 14-day period for submission of written comments prior to the decision;

"(B) State that issues which may provide the basis for an appeal to the board shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]

"* * * * *"

1 withdrew its November 2, 1994 decision for reconsideration
2 pursuant to OAR 661-10-021. The city issued an amended
3 decision on January 4, 1995.

4 The amended decision removes several conditions, as
5 requested by petitioner, and adds the following
6 "supplemental note":

7 "This amendment responds to the applicant's
8 request that the City remove conditions 6, 8, and
9 11 in the November 2, 1994, Notice of Decision on
10 this case. While the City is willing to remove
11 these as conditions of approval, it is important
12 that the applicant, and any subsequent property
13 owners, understand that there is an infrastructure
14 study currently underway [sic] in the East I-5
15 area. Recommendations from the study will likely
16 result in the subject property's being included in
17 the benefit area of a local improvement district
18 and later assessed, and that the current Spicer
19 Road access to Highway 20 may close at some point
20 in the future if the Oregon Department of
21 Transportation determines this intersection has an
22 unacceptable level of service." Record 1.

23 On January 24, 1995, petitioner filed an amended notice
24 of intent to appeal.

25 **PRELIMINARY ISSUE**

26 The city contends that because petitioner did not raise
27 his objections at the local level prior to filing this
28 appeal, he waived them under 197.835(2).³ We disagree. In

³ORS 197.835(2) states, in relevant part:

"Issues [raised before LUBA] shall be limited to those raised
by any participant before the local hearings body as provided
by ORS 197.763. * * *

** * * * **

1 Barrick v. City of Salem, 27 Or LUBA 417, 419-26 (1994), we
2 reviewed the statutory provisions relevant to the
3 requirement to raise issues below. ORS 197.195(3)(c)(B)
4 applies to limited land use decisions. ORS 197.763(1)
5 applies to land use decisions.⁴ We concluded there is no
6 meaningful difference between the ORS 197.195(3)(c)(B)
7 requirement that an issue be raised below "with sufficient
8 specificity to enable the [local] decision maker to respond
9 to the issue" and the ORS 197.763(1) requirement that an
10 issue be raised below "with sufficient specificity so as to
11 afford the [local decision maker] an adequate opportunity to
12 respond to each issue." Id. at 426.

13 We concluded further that the statutory waiver
14 requirements apply to limited land use decisions. However,

⁴ORS 197.763 provides, in relevant part:

"The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

"(1) An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

"* * * * *"

1 ORS 197.195(3)(c)(B), the relevant statutory provision, does
2 not require an applicant, at the risk of waiver, to comment
3 in writing on conditions a local government imposes as part
4 of its decision approving the application. The application
5 itself states what the applicant will accept without
6 objection. If the local government approves something else,
7 the applicant is entitled to appeal to LUBA.

8 The record does not make clear what negotiations
9 occurred between petitioner and the city after the city
10 withdrew its November 2, 1994 decision for reconsideration.
11 OAR 661-10-021, which allows withdrawal, gives local
12 governments an opportunity to reconsider their decisions.
13 It does not, however, impose an obligation on petitioners to
14 make additional objections or waive them. Whatever
15 transpired after the withdrawal of the decision for
16 reconsideration occurred well after the 14-day period for
17 written comment allowed under ORS 197.195(3)(c)(A).
18 Petitioner did not waive his right to object before LUBA to
19 the conditions imposed by the amended decision by failing to
20 object to them prior to adoption of the amended decision.

21 **FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

22 **A. The Dolan Test**

23 The first, third and fourth assignments of error all
24 put at issue whether the city's decision, in imposing
25 certain conditions of approval, meets the requirements of
26 the "rough proportionality" test enunciated in Dolan v. City

1 of Tigard, ___ US ___, 114 S Ct 2309, 129 LEd 2d 304 (1994).
2 Dolan places the burden of showing compliance with the rough
3 proportionality test on a governmental body exacting the
4 dedication of property. Dolan, 114 S Ct at 2320, n8. It
5 requires that body to make "some effort to quantify its
6 findings" beyond a "conclusory statement," although "[n]o
7 precise mathematical calculation is required." Id. at 2322.
8 Petitioner challenges the adequacy of the city's findings
9 and the evidentiary support for those findings.

10 The Oregon Court of Appeals has applied the "rough
11 proportionality" test twice since the Dolan decision. In
12 Schultz v. City of Grants Pass, 131 Or App 220, ___ P2d ___
13 (1994), the court found that an exaction of right-of-way as
14 a condition of partition approval failed to meet the Dolan
15 test. The court decided the exaction related to potential
16 development rather than the proposed development, as
17 required by Dolan.

18 In J.C. Reeves Corp. v. Clackamas County, 131 Or App
19 615, ___ P2d ___ (1994), the Court of Appeals apparently
20 extended the application of the Dolan test to conditions of
21 development approval other than property dedications.⁵ The

⁵In Dolan, 114 S Ct at 2319-21, the Supreme Court relied on the historical and constitutional importance of property ownership to justify placing on local governments the burden of showing that exactions of property dedications satisfy the "rough proportionality" test. The day after deciding Dolan, the Supreme Court vacated and remanded a California impact fee case for reconsideration under the test. Ehrlich v. Culver City, ___ US ___, 114 S Ct 2731, 129 L Ed2d 854 (1994). While Dolan arguably is limited to exactions of dedications, the remand of Ehrlich

1 county based a requirement that the developer construct
2 street frontage improvements on evidence that the proposed
3 subdivision development would add 210 vehicle trips per day
4 to the street. The court read Dolan to require
5 "considerable particularity in local government findings
6 that are aimed at showing the relationship between a
7 developmental condition and the impacts of development."
8 Id. at 618. Simply positing the relationship between
9 subdivision-generated traffic and the need for improvements
10 was not enough. Id. at 622.

11 **B. Petitioner's Arguments**

12 Petitioner contends Conditions 4, 5, 10, 11, 12, 13,
13 and 26 do not satisfy the requirements of Dolan.

14 Condition 4. The parties offer different
15 interpretations of Condition 4.⁶ Petitioner contends

suggests broader applicability of the "rough proportionality" test. Since the Supreme Court remanded Ehrlich, there have been 16 reported cases citing Dolan. In only one, besides J.C. Reeves, has the court actually required application of the "rough proportionality" test to conditions other than dedications. See Christopher Lake Development Co. v. St. Louis Cty., 35 F3d 1269, 1275 (8th Cir 1994).

Both Ehrlich and Christopher Lake involved circumstances that set them apart from the common situation addressed in J.C. Reeves. In Ehrlich, when a developer sought to build housing rather than private recreational facilities, the city charged the developer \$280,000 to mitigate the impact on the community of the land-use change. In Christopher Lake, the county required a developer to construct a \$465,500 drainage system to benefit a large area, when the developer's own project involved a fraction of the area.

⁶Condition 4 states in its entirety:

"Prior to issuance of building permits, design for street improvements for Spicer Road. The improvement shall be for an ultimate width of 36 feet, and shall extend from a point 150

1 Condition 4 fails the "rough proportionality" test adopted
2 in Dolan, because petitioner would be required to design
3 street improvements for Spicer Road extending hundreds of
4 feet beyond either side of the subject property. The city
5 argues Condition 4 requires only that the improvements
6 required by Condition 5 be completed in a manner consistent
7 with the ultimate development of Spicer Road.

8 We find Condition 4 ambiguous. It can be interpreted
9 as petitioner maintains. In support of Condition 4 (and
10 Condition 5), the city made the following findings:

11 "Spicer Road is a county roadway, improved to
12 county standards, but not to city standards. The
13 commercial driveway to the west is a private road,
14 not a City street. The Master Street Plan * * *
15 indicates that a north-south minor collector is
16 intended for this vicinity. Published data
17 indicates that a fast food restaurant with a
18 drive-through window produces an average weekday
19 traffic load of 632 trips. To mitigate this
20 impact, the roadway from the subject property to
21 Santiam must be designed to the collector standard
22 and improvements made to the portion of Spicer
23 Road adjacent to the subject property. Once
24 improvements are made to Spicer Road, the adjacent
25 street network will accommodate the proposed use."
26 Record 10.

27 The sole support for the design requirement is the finding
28 that "[p]ublished data indicates that a fast food restaurant
29 with a drive-through window produces an average weekday

feet east of the subject property['s] east property line to the
intersection of the Santiam Highway. The design section shall
be sufficient for a minor street designation. Make design
allowances for a commercial driveway intersecting Spicer Road
at the current commercial driveway intersection." (Bold in
original.) Record 3.

1 traffic load of 632 trips." Id. The city has not carried
2 the burden, imposed by Dolan, Schultz, and J.C. Reeves, of
3 showing the condition, as it could be interpreted in the
4 future, is "roughly proportional" to the impact of the
5 proposed development.

6 Condition 5. Condition 5 states:

7 **"Prior to issuance of building permits,** provide
8 financial assurances for or construct improvements
9 to Spicer Road. Improvements shall consist of a
10 partial street, drainage, and minimum seven foot
11 curb line sidewalk improvements with appropriate
12 transitions to the east and west of the subject
13 property. Depending on the condition and section
14 of the existing roadway, an overlay may be
15 required on portions of the roadway not being
16 incorporated into the partial street improvement."
17 (Emphasis in original.) Record 3.

18 In support of Condition 5, the city found "the site plan
19 does not adequately demonstrate how storm water runoff from
20 the site will be managed" and, with respect to Spicer Road,
21 made the findings quoted above in the discussion of
22 Condition 4.

23 For two reasons, Condition 5 does not satisfy the Dolan
24 "rough proportionality" test, as extended by J.C. Reeves.
25 First, Condition 5 does not make clear enough what street
26 and frontage improvements are required. In part because of
27 the expansive design requirements of Condition 4, we cannot
28 tell where the "partial street, drainage, and minimum seven
29 foot curb line sidewalk improvements" begin and end.

30 Second, Condition 5 fails to satisfy the "rough

1 proportionality test" in that the findings in support of the
2 requirements for street improvements do no more than what
3 was found unsatisfactory in J.C. Reeves. The city simply
4 posits a relationship between the traffic generated by the
5 proposed development and the need for the required street
6 and frontage improvements. The findings must compare the
7 traffic and other effects of the proposed fast food
8 restaurant to the street and frontage improvements. See
9 J.C. Reeves, supra, 131 Or App at 622.

10 Condition 10. Condition 10 requires petitioner to
11 "provide a method for making the 'future 25-foot Fescue
12 right-of-way' area a 'non-driving area,' or provide an
13 alternative plan meeting the approval of the City Engineer
14 that would allow safe use of this area." Record 4. Since
15 petitioner's own site plan shows the future right-of-way
16 area to be a non-driving area, we agree with the city there
17 has been no exaction.

18 Condition 11. Condition 11 requires petitioner to
19 provide a storm drainage plan "for the development and
20 required related roadway improvements." It also requires
21 petitioner, under certain circumstances, to provide
22 "calculations confirming that the existing ditch and pipe
23 undercrossings are of adequate capacity and grade to
24 accommodate the increased runoff, and that the State of
25 Oregon Highway Department (ODOT) has approved the use of
26 this system." Record 4. In support of Condition 11, the

1 city has found:

2 "Storm drainage utility maps indicate that
3 improved storm drainage systems for this area are
4 not available. It is likely that the existing
5 roadside ditch is inadequate to accommodate site
6 drainage as well as drainage for the required
7 roadway improvements on Spicer. The site plan
8 does not adequately demonstrate how storm water
9 runoff from the site will be managed. The
10 applicant will demonstrate that the storm drainage
11 system is adequate through the conditions of
12 approval." Record 10.

13 Condition 11 is not an exaction. It simply requires
14 petitioner to provide a plan to show petitioner will satisfy
15 the city's storm drainage requirements. The condition
16 ensures that a specific impact of petitioner's proposed
17 development will be addressed prior to issuance of a permit.

18 Conditions 12, 13, and 26. Condition 12 states that
19 the 6-inch storm drain line does not appear to be a public
20 line "and therefore cannot be used to route drainage from
21 this site" and that the "12-inch line along Spicer Road will
22 likely have to be reconstructed in conjunction with the
23 required roadway improvements." Record 4. Condition 13
24 advises petitioner that "[a]ll required public storm
25 drainage system improvements must be constructed, or
26 financial assurances provided for their construction, **prior**
27 **to issuance of building permits.**" (Emphasis in original.)

28 Id. Condition 26 recites various city requirements and
29 warns petitioner that the site plan must eventually include
30 certain additional details. Conditions 12, 13, and 26 are
31 merely advisory. They are not exactions.

1 The city has failed to adopt findings adequate to
2 support Conditions 4 and 5. Because the findings are
3 inadequate, no purpose would be served by reviewing them for
4 evidentiary support. DLCD v. Columbia County, 16 Or LUBA
5 467, 471 (1988).

6 The first, third and fourth assignments of error are
7 sustained as to Conditions 4 and 5, and are otherwise
8 denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner contends the city does not have jurisdiction
11 to require the design and construction of a road which is
12 owned by two different jurisdictions. The city's design
13 requirement is based on Albany Development Code 8.070(1),
14 which conditions development approval upon a finding that
15 public facilities can accommodate the proposed development.
16 Conditions 4 and 5 simply inform petitioner that if
17 petitioner cannot design and construct Spicer Road in such a
18 manner that it can accommodate petitioner's proposed fast
19 food restaurant, petitioner cannot build the restaurant.

20 The second assignment of error is denied.

21 **FIFTH ASSIGNMENT OF ERROR**

22 Petitioner objects to the "supplemental note" quoted
23 above, expressing concern that the inclusion of the
24 supplemental note in the notice of decision may make it more
25 difficult for him to obtain financing for the project.
26 Petitioner cites no legal basis for his objection.

1 The fifth assignment of error is denied.

2 The city's decision is remanded.