

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 On remand from the Court of Appeals.

16
17 Edward F. Schulz, Albany, represented petitioner.

18
19 James V. B. Delapoer, Albany, represented respondent.

20
21 LIVINGSTON, Chief Referee; GUSTAFSON, Referee; HANNA,
22 Referee, participated in the decision.

23
24 REMANDED 04/11/96

25
26 You are entitled to judicial review of this Order.
27 Judicial review is governed by the provisions of ORS
28 197.850.

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 **BACKGROUND**

6 In Clark v. City of Albany, 29 Or LUBA 325 (1995)
7 (Clark I), petitioner challenged (1) six conditions imposed
8 on a site plan approval of a fast-food, drive-in restaurant;
9 and (2) a "supplemental note."¹ We decided that conditions
10 4 and 5 violate the requirement stated in Dolan v. City of
11 Tigard, ___ US ___, 114 S Ct 2309, 129 LEd 2d 304 (1994),
12 which places the burden of showing compliance with the rough
13 proportionality test on a governmental body exacting the
14 dedication of property. Dolan, 114 S Ct at 2320, n8. Dolan
15 requires that body to make "some effort to quantify its
16 findings" beyond a "conclusory statement," although "[n]o
17 precise mathematical calculation is required." Id. at 2322.

¹The supplemental note states:

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

1 We also decided that conditions 10, 11, 12, 13 and 26
2 do not violate Dolan, and we sustained the supplemental
3 note.

4 Both parties appealed to the Court of Appeals. In its
5 opinion, the court reversed and remanded to LUBA with
6 instructions to reconsider condition 26 and to direct the
7 city to delete the supplemental note from its decision.
8 Clark v. City of Albany, 137 Or App 293, ___ P2d ___ (1995)
9 (Clark II).

10 **DISCUSSION**

11 **A. Condition 26**

12 Condition 26 states:

13 "The sidewalk adjacent to Spicer Road must be
14 seven feet wide. This width may be reduced to six
15 feet if the sidewalk is separated from the curb by
16 a landscaped planter at least five feet wide.
17 Parking lot must be constructed in conformance
18 with Section 9.120(3) of the revised Albany
19 Development Code. The Site Plan does not indicate
20 perimeter curbing [ADC9.120(5) revised] nor wheel
21 bumpers for parking slots fronting sidewalks.
22 [ADC9.120(6) revised] This requirement must be
23 indicated on the plans submitted for Building
24 Permits and must be met at the time of
25 construction of the parking lot. (Note: If
26 sidewalks are 7'6" wide, wheel bumpers are not
27 required and the length of the space becomes
28 16'6".)" Record 6. (Brackets in original.)

29 With respect to condition 26, the Court of Appeals
30 stated:

31 "As we read the condition, it [states] present
32 requirements that are necessary precursors to
33 future actions. Stated differently, condition 26
34 appears to require petitioner to take definitive

1 action of a very specific nature on and affecting
2 his property before the next step in the process -
3 - and the next appealable event -- occurs. It is
4 immaterial that the requirements need only be
5 'indicated' on the plans submitted for building
6 permits, but not 'met' until construction occurs.
7 The clear import is that the next steps in the
8 approval process cannot be taken unless and until
9 the precisely-defined requirements of condition 26
10 are incorporated into the developmental scheme."
11 Clark II at 302.

12 Condition 26 imposes several requirements pertaining to
13 sidewalk improvements, the parking lot, perimeter curbing
14 and wheel bumpers. In Clark I, petitioner challenged only
15 the requirement that a sidewalk meeting certain
16 specifications be constructed adjacent to Spicer Road.
17 Record 156. That part of condition 26 duplicates and
18 elaborates upon condition 5, which we and the Court of
19 Appeals decided does not satisfy the Dolan "rough
20 proportionality" test without additional findings.
21 Therefore, the part of condition 26 specifying required
22 sidewalk improvements is remanded. The balance of condition
23 26 is sustained.

24 **B. Supplemental Note**

25 The city must delete the supplemental note from its
26 decision.

27 The city's decision is remanded.