

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 COLUMBIA RIVERKEEPER,
5 COLUMBIA RIVER BUSINESS ALLIANCE,
6 OREGON CHAPTER SIERRA CLUB,
7 COLUMBIA RIVER CLEAN ENERGY COALITION,
8 JACK MARINCOVICH and PETER HUHTALA,
9 *Petitioners,*

10
11 vs.

12
13 CLATSOP COUNTY,
14 *Respondent,*

15
16 and

17
18 BRADWOOD LANDING LLC,
19 *Intervenor-Respondent.*

20
21 LUBA No. 2008-067

22
23 FINAL OPINION
24 AND ORDER

25
26 Appeal from Clatsop County.

27
28 Jannett Wilson, Eugene, and Brett VandenHeuvel, Hood River, filed the petition for
29 review and argued on behalf of petitioners. With them on the brief was Goal One Coalition.

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31 E. Andrew Jordan, Portland, filed a joint response brief and represented respondent.
32 With him on the brief were Jordan Schrader Ramis PC, Michelle Rudd and Stoel Rives LLP.

33
34 Michelle Rudd, Portland, filed a joint response brief and argued on behalf of
35 intervenor-respondent. With her on the brief were Stoel Rives LLP, E. Andrew Jordan and
36 Jordan Schrader Ramis PC.

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38 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

39
40 RYAN, Board Member, did not participate in the decision.

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42 AFFIRMED

01/27/2009

1 You are entitled to judicial review of this Order. Judicial review is governed by the
2 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision approving a variance to the county’s road standards to facilitate construction of a liquefied natural gas (LNG) terminal.

FACTS

The present appeal is a companion to a separate appeal approving intervenor’s proposed LNG terminal at Bradwood Landing, on the Columbia River, on a parcel with deep-water access that is zoned for marine industrial uses. *See Columbia Riverkeepers v. Clatsop County*, __ Or LUBA __ (LUBA No. 2008-052), issued this date. The primary road access to the Bradwood Landing site is via Clifton Road, a 2.5-mile-long road that connects the parcel to Highway 30. Clifton Road is designated a collector street under the county’s transportation system plan (TSP). The area surrounding the Bradwood Landing site and the Clifton Road right-of-way is generally zoned for forest uses.

Under the county’s TSP, a collector street is a road that is designed to handle between 300 and 1000 vehicle trips per day. The county road standards are set forth in Table 1 to the Clatsop County Standards Document, S6.000 *et seq.* For a collector road, Table 1 requires a 24-foot pavement width with four foot shoulders, 60 feet of right-of-way, a 40 miles-per-hour design speed, a maximum 12 percent grade, and a minimum curve radius of 500 feet. Clifton Road currently has 16 to 20-foot improved surface with no shoulders within a 60-foot right-of-way, and has a number of tight curves well below 500 feet in radius. Because of the substandard condition of the road and the tight curves, the posted speed limit is only 15 miles per hour. As currently improved, Clifton Road is not wide enough in spots for two large trucks to pass.

The proposed LNG facility would significantly increase traffic on Clifton Road, which currently averages less than 50 trips per day. Construction of the facility would add approximately 400 trips per day for three years, and permanent operation of the LNG

1 terminal would add approximately 150 trips per day. Based on a memorandum from county
2 counsel, the county concluded as part of the proceedings on the LGN terminal application
3 that intervenor will either have to construct Clifton Road to full collector standards, or to file
4 a separate application to obtain a variance from those road standards. Intervenor chose to
5 apply for a variance, and filed a separate application seeking to significantly improve Clifton
6 Road from its current condition, but not to full collector street standards.

7 The planning commission approved the requested variances. Petitioners appealed the
8 planning commission decision to the board of county commissioners. The commissioners
9 ultimately approved a set of variances that provide for (1) a pavement width of 24 feet with
10 two-foot (instead of four-foot) shoulders, (2) a 30 miles-per-hour speed limit, (3) a 12.4
11 percent grade, and (4) a curve radius ranging from 275 feet to 407 feet for the ten curves in
12 the road.¹ The decision also requires adding 1,000 feet of guardrails (Clifton Road currently
13 has none). If constructed as proposed, travel times between the Bradwood Landing site and
14 Highway 30 will improve from nine minutes, 42 seconds to five minutes, 49 seconds.

15 This appeal followed.

16 **INTRODUCTION**

17 The major dispute in this appeal concerns the variance from the 500-foot curve radius
18 requirement. Two of the new curves, Curves 3 and 5, will require acquisition of additional
19 right-of-way to meet even the reduced radius requirement. The county owns the adjoining
20 land necessary to expand the right of way near Curve 3, and the private landowner who owns
21 the land necessary to expand the right of way near Curve 5 has indicated that it is willing to
22 sell the land to the county. The county imposed conditions requiring that land needed to

¹ The county traffic engineer determined that a 275-foot radius curve was the minimum necessary for safety, and the county commissioners modified the planning commission approval, which had permitted a radius of 154 feet at Curve 5, to require a radius of at least 275 feet for all ten curves.

1 expand the right of way in these two locations be acquired and alternative conditions if the
2 land cannot be acquired without condemnation.

3 In the first assignment of error, petitioners challenge the county’s findings under five
4 of the seven variance criteria at Clatsop County Land and Water Development and Use
5 Ordinance (LWDUO) 5.132(3).² Under the second assignment of error, petitioners argue

² LWDUO 5.132 provides, in relevant part:

“(1) A variance may be appropriate where: by reason of exceptional configuration, or by reason of other extraordinary and exceptional situations or conditions existing on a piece of property, the strict application of any regulations enacted under this Ordinance would result in peculiar, exceptional and undue hardship upon the owner of such property for which a variance is requested. Undue hardship upon adjacent property owners may also be considered. The Hearings Officer may vary or adopt the strict application of any of the requirements of this Ordinance.

“* * * * *

“(3) Standards for a Variance. The requirements for a Variance are listed below. It is the intent of this Ordinance that a variance only be granted to overcome some exceptional physical condition related to a parcel of land posing practical difficulty to development and preventing the owner from using the property as intended by the Zoning Ordinance. Any variance granted shall be the minimum adjustment necessary for the reasonable use of the land.

“(A) There must be proof of exceptional and extraordinary circumstances which apply to the property and which do not apply to other properties in the same zone or vicinity, and result from lot size or shape legally existing in accordance with land use laws prior to September 30, 1980, topography, geology, or other circumstances over which the applicant has no control. These circumstances or conditions must be such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of the land and/or structure.

“(B) The granting of a variance shall neither be injurious to the neighborhood or community nor otherwise detrimental to the public welfare or to public safety.

“(C) The granting of the variance will not permit the establishment of any development or use which is not permitted by the Ordinance, nor confer upon the applicant any special privilege that is denied by this Ordinance to other lands, structures or buildings in the area.

“(D) There must be proof of significant hardship if the variance is not granted. It is not sufficient proof of hardship to show that a greater profit would result if a variance were granted. Nor shall loss of value be a valid reason to grant a variance. Furthermore, the hardship cannot be self-created or self-imposed, nor can it be created by one who purchases property with or

1 generally that the county erred in relying on the purported lack of “rough proportionality”
2 between the impacts of the proposed LNG terminal and the road improvements and property
3 exactions required to comply with the Table 1 standards, as one basis to grant the requested
4 variances.

5 In granting the disputed variances, the county relied on *Dolan v. City of Tigard*, 512
6 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), which held that the Takings Clause in the Fifth
7 Amendment to United States Constitution requires that in exacting property from
8 development applicants as a condition of approval, local governments must demonstrate that
9 the exaction is “roughly proportional” to the impacts of the proposed development on public
10 services and infrastructure, to avoid the constitutional obligation to provide just
11 compensation for the taking.

12 The county also relied on a provision of the Clatsop County Standards Document, at
13 S6.005(2), which provides that

14 “No development may occur unless required transportation facilities are in
15 place or guaranteed, in conformance with the provisions of this document.
16 *Improvements required as a condition of development approval, when not*
17 *voluntarily accepted by the Applicant, shall be roughly proportional to the*
18 *impact of development on public facilities and services. Findings in the*
19 *development approval shall indicate how the required improvements are*
20 *roughly proportional to the impact.” (Emphasis added.)*

without the knowledge of restrictions present. The hardship must result from the strict application of this Ordinance, and be suffered directly by the property in question. Evidence of a variance granted under similar circumstances shall not be considered as a solely sufficient cause to grant hardship relief.

- “(E) The granting of a variance is necessary for the reasonable use of land or building, and the variance granted by the hearing body is the minimum variance that will accomplish this purpose.
- “(F) The hardship does not arise from a violation of the provisions of this Ordinance.
- “(G) The development will occur on a parcel of land that in conjunction with adjacent land in the same ownership is not otherwise reasonably capable of development and use under the provisions of this Ordinance.”

1 Because the county appeared to have relied heavily on *Dolan* and S6.005(2) as a
2 basis to grant the requested variances under LWDUO 5.132(3), and in our view resolution of
3 the second assignment of error has a dispositive bearing on the first assignment of error, we
4 turn initially to petitioner’s second assignment of error.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners challenge the county’s reliance on the “rough proportionality” test in
7 *Dolan* and S6.005(2) as a basis to grant the disputed variances. According to petitioners,
8 requiring intervenor to meet the county road standards is not an “exaction” of property for
9 purposes of *Dolan*; it is largely a simple expenditure of money. Second, petitioners dispute
10 the county’s finding that the burden of improving Clifton Road to full collector standards is
11 not roughly proportional to the impacts of the proposed LNG terminal on public facilities.
12 Finally, petitioners argue that the rough proportionality analysis plays a role only with
13 respect to the LNG application, not the variance application. Petitioners contend that a rough
14 proportionality analysis is simply irrelevant to a finding of compliance with any of the
15 LWDUO 5.132(3) variance criteria, which findings must stand or fall on their own.

16 Turning to the last argument, intervenor responds that *Dolan* itself arose out of an
17 application for a variance from a city requirement to dedicate property as a condition of
18 development approval. *See Dolan v. City of Tigard*, 317 Or 110, 113, 854 P2d 437 (1993)
19 (recounting history of case). Indeed, intervenor argues that to satisfy ripeness and exhaustion
20 requirements, an applicant may be required to first seek a variance from a requirement to
21 dedicate property, before challenging that dedication as a takings. *See Reeves v. City of*
22 *Tualatin*, 31 Or LUBA 11, 17 (1996) (dismissing appeal of subdivision approval that
23 required dedication, because the applicant had not first sought a variance from the dedication
24 requirement).

25 We agree with intervenor that the *Dolan* rough proportionality test can play a role in
26 determining whether to grant variances from local approval criteria that require dedication or

1 exactions of property. Where *Dolan* operates, it can function as a kind of variance, providing
2 a basis under which the local government may choose not to exact property as a condition of
3 development approval that it would otherwise be entitled to exact under its land use
4 regulations, as an alternative to compensating the landowner for the taking. In *Dudek v.*
5 *Umatilla County*, 187 Or App 504, 69 P3d 751 (2003), which the county cites in its findings,
6 the Court of Appeals affirmed a county decision not to require a partition applicant to acquire
7 and dedicate to the county easements necessary to bring a half-mile stretch of county road
8 external to the subject property up to the code-required right-of-way width, where the
9 proposed residential development would contribute only 15 percent of the traffic on the road.

10 Exactly how the *Dolan* rough proportionality test is applied in the context of a
11 requested variance to county road improvement standards, and the weight that test is given in
12 addressing variance criteria, is less clear. In *Dudek*, the Court questioned an earlier line of
13 Oregon cases indicating that expenses to improve public facilities such as road construction
14 costs may be subject to *Dolan*, and cited several federal court decisions to the contrary.
15 Under that view, only exactions of property such as requirements to dedicate real property
16 interests are subject to *Dolan*, not mere expenses to construct or improve public roads. In
17 the present case, that would mean that the only aspects of the requested variances that the
18 *Dolan* analysis would be potentially applicable or relevant to is the request to reduce
19 minimum curve radii, in locations where compliance with the county road standards would
20 require a curve radius outside the existing 60-foot right of way, necessitating acquisition and
21 dedication of property. The rough proportionality requirement would have no bearing on any
22 variances not involving the dedication of a property interest, such as the additional cost to
23 construct shoulders to the required width within the existing right-of-way.

24 However, we need to resolve that point, because in the present case the county also
25 relied upon S6.005(2), which in relevant part provides that “[i]mprovements required as a
26 condition of development approval * * * shall be roughly proportional to the impact of

1 development on public facilities and services.” Even if *Dolan* is limited to exactions of
2 property, S6.005(2) expressly includes “improvements” to public facilities, and is not limited
3 to dedication of property interests. Thus, S6.005(2) appears to limit the county’s ability to
4 require a development applicant to improve public facilities to comply with county road
5 standards. Under S6.005(2), the county cannot require improvements beyond those that are
6 “roughly proportional” to the impacts of the proposed development. S6.005(2) is part of the
7 County Standards Document that sets forth the same collector road standards from which
8 intervenor seeks a variance. As a general proposition, we see no error in applying S6.005(2)
9 to help the county determine whether the requested variances from collector road standards
10 are warranted.

11 It is not clear to us exactly how the county would use S6.005(2) to determine whether
12 the applicant has demonstrated compliance with the seven variance criteria at LWDUO
13 5.132(3). As petitioners point out, the rough proportionality test has no obvious relevance to
14 some of the variance criteria, such as the requirement that the applicant demonstrate that
15 there are “exceptional and extraordinary circumstances which apply to the property and
16 which do not apply to other properties in the same zone or vicinity, and result from lot size or
17 shape * * * topography, geology, or other circumstances over which the applicant has no
18 control.” *See* n 2. Arguably, S6.005(2) sets out an entirely independent basis to conclude
19 that code-required improvements that are disproportional to the impacts of the proposed
20 development cannot be imposed. Under that view, whether or not a requested variance from
21 road improvement standards complies with all of the criteria at LWDUO 5.132(3), the county
22 could nonetheless reduce the required level of improvements, to the extent that the record
23 demonstrates that the reduced level of required improvements is required by S6.005(2).

1 Based on the county’s findings, the county appears to understand S6.005(2) to operate in that
2 manner.³

3 Petitioners offer no focused argument to the contrary, and therefore we assume for
4 purposes of this opinion that S6.005(2) permits the county to reduce the level of
5 improvements otherwise required by the county road standards to a level roughly
6 proportional to the impacts of the LNG terminal, as an independent alternative to granting a
7 variance under LWDUO 5.132(3).

8 As noted, petitioners dispute the county’s findings that requiring full compliance with
9 the collector road standards would violate the S6.005(2) rough proportionality requirement.

³ The county’s findings state, in relevant part:

“The variance is further supported by the rough proportionality requirement found in both S6.005 and the U.S. Constitution.

“* * * * *

“Citation to road standards in an ordinance does not make them invulnerable to challenge in their application. Exactions of private property must be proportional to the burden imposed by the project. An exaction of private property is required in the Bradwood case to meet the full Table 1 standards, since achieving either the Table 1 500-foot curve radius or the 275-foot curve radius would require acquisition of property owned by Matoaka Forests LLC and then conveyance of that land to Clatsop County.

“The Clatsop County Code rough proportionality requirement [at S6.005(2)] independently implements *Dolan v. City of Tigard*, 512 US 374 (1994). The *Dolan* test was designed to protect property owners from being ‘singled out for responsibility to make improvements having no or a limited relationship to the requested development, simply because the owner sought to exercise rights incidental to property ownership.’ *McClure v. City of Springfield*, 175 Or App 425, 435, 28 P3d 1222 (2001), fn 6. Clatsop County has legislatively made the rough proportionality standard part of its code. S6.005(2).

“[Similar to the facts in *McClure*], the specific curve radius speed limit and grade requirements of Table 1 are not linked in this record to impact of a marine industrial development.

“The fact that Clifton Road was originally laid out with less grade, larger curve radii or more linearly such that a higher speed limit would be appropriate are not impacts of the development of the Bradwood site and the evidence in the record demonstrates that Clifton Road will be a safe travel way with the level of improvements proposed. The evidence does not show that the minimal incremental traffic that Bradwood Landing will add to Clifton Road necessitates higher traffic speed or wider curves. The required proportionality is lacking and the variance should be approved subject to completion of the improvements described in this narrative.” Record 47-49.

1 Petitioners' specific challenges to those findings, however, are quite limited. Petitioners
2 argue:

3 “* * * [T]he need to improve the road to comply with the collector street
4 standards is directly related to the applicant's proposed LNG facility, because
5 the Bradwood Landing development alone would cause the traffic to exceed
6 the 300 trip threshold for collector streets. The LNG facility would cause the
7 average daily trips to increase by 800 percent for three years and almost 300
8 percent thereafter. Rec 32 (fn 3). This dramatic increase in traffic will
9 include large construction vehicles that are unsafe on the narrow and winding
10 Clifton Road. * * * The LNG terminal will dramatically increase the traffic
11 on Clifton Road, leading to increased delay and potential accidents. The staff
12 report stated constructing the LNG terminal without meeting the road
13 standards 'would create a precarious situation for residents of Clifton and
14 those working at the proposed facility.' Rec 1358. Ensuring public safety is
15 clearly proportional to the cost of improving the road to meet the minimum
16 safety standards.” Petition for Review 17-18.

17 Petitioners essentially disagree with the county's conclusion that requiring intervenor
18 to bring Clifton Road up to full compliance with the collector street standards would not be
19 “roughly proportional” to the traffic impacts of the LNG terminal. However, that
20 disagreement falls short of demonstrating that the county's conclusion is erroneous or not
21 supported by substantial evidence.

22 As the county's findings point out, after construction is completed the number of
23 daily vehicle trips attributable to the facility will be approximately 150 trips, which
24 combined with the average 50 daily trips generated by other current users of the road is less
25 than the 300 daily vehicle trips that is the lower threshold between a local street and a
26 collector street under the county's TSP. Even during the three-year construction period the
27 number of total daily trips (450) will be in the low end of the range for collector streets (300
28 to 1000). While intervenor's LNG facility will add significant levels of traffic to the road,
29 intervenor is also required to significantly upgrade the road. Under the decision, Clifton
30 Road will be significantly improved and upgraded from its current very substandard
31 condition to a level not much short of full compliance with collector street standards. We
32 cannot say, or at least petitioners have not demonstrated, that the county erred in concluding

1 that requiring intervenor to improve the road to full collector standards would not be roughly
2 proportional to the traffic impacts of the LNG facility, and therefore contrary to S6.005(2).

3 The second assignment of error is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 Under the first assignment of error, petitioners challenge the findings and evidence
6 supporting the county's conclusion that a variance is warranted under the seven LWDUO
7 5.132(3) variance criteria. *See* n 2. Specifically, petitioners challenge the county's findings
8 that the proposed variances satisfy LWDUO 5.132(3)(A), (B), (C), (D), (E) and (G).

9 It is fair to say that the variance criteria at LWDUO 5.132(3)(A), (B), (C), (D), (E)
10 and (G) are strongly worded and set a relatively high bar to granting a variance. To cite one
11 example already noted, LWDUO 5.132(3)(A) requires "proof of exceptional and
12 extraordinary circumstances which apply to the property and which do not apply to other
13 properties in the same zone or vicinity, and result from lot size or shape legally existing in
14 accordance with land use laws prior to September 30, 1980, topography, geology, or other
15 circumstances over which the applicant has no control." Further, "[t]hese circumstances or
16 conditions must be such that the strict application of the provisions of this Ordinance would
17 deprive the applicant of the reasonable use of the land and/or structure." In addition, several
18 of the variance criteria are clearly written under the presumption that the circumstances that
19 warrant a variance will arise from the property owned by the variance applicant. Here, the
20 circumstances and conditions that the county cites relate mostly to the condition of Clifton
21 Road, not the Bradwood Landing site itself.

22 Perhaps for those reasons, the county's findings strain at times to explain why some
23 of the variance criteria are met. For example, under LWDUO 5.132(3)(A), petitioners argue
24 that the county failed to adequately explain why requiring intervenor to improve Clifton
25 Road to full collector street status would "deprive the applicant of the reasonable use" of the
26 Bradwood Landing site. According to petitioners, improving Clifton Road to full collector

1 status, including acquisition of any needed additional right of way, is simply a matter of
2 money. We tend to agree with petitioners that the county does not offer a particularly
3 compelling explanation for why requiring intervenor to improve Clifton Road to full
4 collector standards would deprive intervenor of the reasonable use of the Bradwood Landing
5 site.

6 However, we need not resolve petitioners' specific challenges to the county's
7 findings that a variance is warranted under LWDUO 5.132(3)(A), (B), (C), (D), (E) and (G).
8 As explained above, the county justified the variance in part based on the rough
9 proportionality test embodied in S6.005(2). As we understand the county's approach, it
10 regards S6.005(2) as a sufficient basis to reduce the level of improvements otherwise
11 required by the county road standards documents, where the applicant demonstrates that full
12 compliance with those standards would not be roughly proportional to the impacts of the
13 proposed development. We affirmed above the county's conclusion that S6.005(2) prohibits
14 requiring intervenor to improve Clifton Road to full collector standards. Given that
15 conclusion, any error or inadequacy in the county's findings and conclusion that each of the
16 variance criteria at LWDUO 5.132(3) is met would appear to be harmless error.
17 Accordingly, petitioners' arguments under the first assignment of error do not provide a basis
18 for reversal or remand, and we therefore do not resolve petitioners' challenges to the
19 county's findings under LWDUO 5.132(3).

20 The first assignment of error is denied.

21 The county's decision is affirmed.