

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

BILL CLARK, )  
 )  
 Petitioner, )  
 ) LUBA No. 95-235  
 vs. )  
 ) FINAL OPINION  
 CITY OF ALBANY, ) AND ORDER  
 )  
 Respondent. )

Appeal from City of Albany.

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

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

GUSTAFSON, Referee; LIVINGSTON, Chief Referee, participated in the decision.

AFFIRMED 07/15/96

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals two conditions of approval of a zone  
4 change application and site plan review.

5 **FACTS**

6 Petitioner applied to the city for approval of a zone  
7 change from Light Industrial (LI) to Heavy Commercial (CH)  
8 and for a site plan review for a 95-room motel.  
9 Petitioner's property is located on Price Road, east of the  
10 I-5 freeway, and north of Highway 20. South of the  
11 property, between petitioner's property and Highway 20 are  
12 two existing motels and a restaurant. To the north is a  
13 public park, the county fair grounds and the county  
14 exposition center. The property to the east, across Price  
15 Road, is owned by the city and is undeveloped. According to  
16 petitioner, the city plans to develop this property as a  
17 fire station; however, there is no evidence in the record  
18 that such a proposal has been made.

19 Price Road extends along the entire frontage of  
20 petitioner's property and is proposed to provide the sole  
21 access to petitioner's motel. It is undisputed that Price  
22 Road is in poor condition. As described in the city's  
23 findings:

24 "Existing pavement on Price Road along the  
25 project's frontage was not constructed to city  
26 standards. It does not have curb, gutter, or  
27 sidewalk; is approximately 19 feet in width; is  
28 alligatored and rutted; has no rock base; and is

1 rated in failed condition by the City's pavement  
2 management program. The pavement has insufficient  
3 width and is structurally inadequate to  
4 accommodate the proposed development." Record 18.

5 South of the proposed development, Price Road has been  
6 developed between Highway 20 and the subject site. However,  
7 regarding the intersection of Highway 20 and Price Road, the  
8 city's undisputed findings state:

9 "The south-bound left turn movement from Price  
10 Road onto Highway 20 has a level of service (LOS)  
11 'F.' Price [R]oad between Highway 20 and the  
12 project site is improved to city standards and has  
13 a curb-to-curb width of 36 feet. The applicant  
14 did not submit a traffic study with the  
15 application. City staff has used historical data  
16 on motel occupancy and the Institute of  
17 Transportation Engineers trip generation  
18 guidelines to estimate the amount of traffic that  
19 will be generated by the project.

20 " \* \* \* \* \*

21 "The level of service deficiency for the south-  
22 bound left turn movement at Highway 20 cannot be  
23 corrected without installation of a traffic  
24 signal. Representatives of the Oregon Department  
25 of Transportation (ODOT) have verbally stated that  
26 they will not allow a signal to be installed at  
27 the Price Road/Highway 20 intersection due to its  
28 proximity to the I-5 interchange. A traffic study  
29 performed by Kimley-Horn and Associates for the  
30 Linn County Fairgrounds/Expo Center indicated that  
31 this problem could only be corrected by  
32 construction of a new street connection to Highway  
33 20 east of Price Road, and installation of a  
34 traffic signal at that location." Record 19.

35 The city approved both the zone change and the site  
36 plan review, subject to conditions. Petitioner challenges  
37 two of those conditions: one that requires partial, 24-foot

1 street improvements along the site's Price Road frontage;  
2 and one that requires petitioner to sign a "[p]etition for  
3 Improvement/Waiver of Remonstrance \* \* \* for participation  
4 in a Local Improvement District for a future traffic signal  
5 at a new street connection to Highway 20 east of Price  
6 Road." Record 8.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 In his first assignment of error, petitioner contends  
9 the city erred by failing to conduct a "roughly  
10 proportional" test in determining the allocation of costs  
11 for the street improvements along Price Road. Petitioner  
12 asserts that "what the city has left out of the equation is  
13 its proportionate share of the road costs for the uses which  
14 are municipal uses." Petition for Review 6.

15 In his second assignment of error, petitioner contends  
16 the city erred by rejecting petitioner's proposed cost  
17 allocation. The basis for this argument is that Linn  
18 County, through a separate agreement with the city, has  
19 agreed to compensate the city with street improvements on  
20 Price Road, apparently in exchange for the city's transfer  
21 of property to the county for use as the county fairgrounds.  
22 Petitioner asserts that he "acknowledges that he must pay  
23 his proportional share of the cost attributed to the  
24 project. The difference between the City and the Petitioner  
25 is what to do with the funds from Linn County." Petition  
26 for Review 6.

1           Petitioner asserts he is entitled to share in the  
2 benefit of the county's contribution to the necessary road  
3 improvements. Petitioner further asserts that since the  
4 public will benefit from the street improvements, the city  
5 should immediately contribute to development of a full, 36-  
6 foot wide road. Petitioner calculates that the county  
7 contribution should be shared between the city and  
8 petitioner, and that each should pay half of the remaining  
9 cost for full road improvements. Petitioner argues this  
10 allocation is required by the "roughly proportional" test  
11 mandated in Dolan v. City of Tigard, \_\_\_ US \_\_\_, 114 S Ct  
12 2309, 129 L Ed2d 304 (1994).

13           There is nothing in the record regarding the agreement  
14 between the city and county regarding Price Road  
15 improvements, and certainly nothing that indicates that  
16 petitioner is intended or entitled to be a beneficiary of a  
17 property exchange agreement between the city and county. An  
18 agreement between the city and county, wholly unrelated to  
19 petitioner's proposed development, is not relevant to  
20 petitioner's obligation to pay for road improvements  
21 necessary for petitioner's proposed development.

22           The Dolan "rough proportionality" test does not  
23 contemplate the type of cost allocation petitioner desires.  
24 That test requires that the local government establish a  
25 "rough proportionality" between the impacts of the proposed  
26 development and the burden imposed on petitioner by making

1 "some sort of individualized determination that the required  
2 dedication is related both in nature and extent to the  
3 impact of the proposed development." Dolan, 114 S Ct at  
4 2320. In Clark v. City of Albany, 137 Or App 293, 904 P2d  
5 185 (1995), the Court of Appeals explained:

6 "If \* \* \* the city is able to make satisfactory  
7 findings that demonstrate that petitioner's  
8 project is the sole or principal beneficiary of  
9 the improvements that he is required to make and  
10 that the requirements are responsive to impacts  
11 that the development will have, the city almost  
12 certainly would also succeed in demonstrating  
13 'rough proportionality'." Id. at 299.

14 Petitioner does not challenge the city's finding that  
15 the required 24 feet of road improvement is the minimum  
16 improvement needed to make Price Road adequate for  
17 petitioner's proposed development. Indeed, petitioner seeks  
18 to have the road immediately developed to a 36-foot width.  
19 The city's findings also include a traffic count from which  
20 the city concluded, with detailed findings, that the  
21 proposed motel will generate more than 50 percent of the  
22 vehicles that use Price Road along the property frontage.  
23 Petitioner did not challenge the city's traffic analysis  
24 during the local hearing process, and submitted no  
25 conflicting evidence or data concerning the traffic impact  
26 of the proposed development. On appeal, however, petitioner  
27 argues that the city's data is incorrect, and that the  
28 city's engineering department should have considered  
29 additional factors, including traffic counts at other times

1 during the year when traffic is heavier.

2 Our review is based on the record of the local  
3 government. Petitioner cites no evidence in the local  
4 record that would challenge the evidence upon which the city  
5 relied to determine that petitioner's project will generate  
6 more than 50 percent of the traffic along the property's  
7 Price Road frontage. There is substantial evidence in the  
8 record to support the city's finding.

9 Petitioner's underlying argument, however, is not the  
10 amount of traffic his proposed development will generate.  
11 Rather, petitioner seeks to extend the Dolan rough  
12 proportionality test to require the city to contribute to  
13 the cost of the improvements directly proportional to  
14 petitioner's proposed development. Petitioner argues "the  
15 City should view itself as an adjacent property owner who  
16 has all of the attributes of a developer." Petition for  
17 Review 7. If the city proposed to develop its property on  
18 the east side of Price Road, petitioner's argument might  
19 have merit. However, the city does not have "all of the  
20 attributes of a developer" because the city has not proposed  
21 to develop that property.

22 The effect of petitioner's proposed reading of Dolan  
23 would be to require an adjoining property owner to develop  
24 its property frontage, or to contribute to another's  
25 development, regardless of whether it proposes any  
26 development. Dolan does not require improvements or

1 contribution from an adjacent property owner simply because  
2 that owner may develop the adjacent property in the future.  
3 Nor does Dolan or any other authority support petitioner's  
4 desired result that a private developer can dictate how and  
5 when public funds are expended simply because a municipality  
6 owns surrounding property and, therefore, there will be an  
7 incidental public benefit from the developer's improvements.

8 The city determined in this case that petitioner's  
9 development will receive the sole or principal benefit of  
10 the improvements that he is required to make, and that the  
11 requirements are directly responsive to the impacts that the  
12 development will have. The city has satisfied the "rough  
13 proportionality" test.

14 The first and second assignments of error are denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 Petitioner asserts the city erred in requiring him to  
17 sign, as a condition of approval, a waiver of remonstrance  
18 for street improvements because the condition bears no nexus  
19 to the proposed project. Petitioner argues:

20 "Petitioner is being asked to petition for the  
21 unknown and agree that he will not object to  
22 whatever the City does. Further, he must bind all  
23 future owners of the property with this agreement.  
24 In order to make an informed choice, Petitioner  
25 must have knowledge of what it is he is required  
26 to petition for and [to] what he will agree not to  
27 object. There is not substantial evidence in the  
28 Record to support the City's decision for the  
29 requirement of the Petition and Waiver." Petition  
30 for Review 8.



1 The city responds:

2 "The condition in question only requires that the  
3 petitioner, along with other benefited property  
4 owners, participate in the financing of the street  
5 relocation and traffic signal, if and when such an  
6 improvement is ever required. It would be  
7 impossible to do a Dolan rough proportionality  
8 analysis for this condition at the present time  
9 because no one has any data concerning the costs  
10 of the project or the boundaries of the benefit  
11 area. It must also be recognized that this  
12 analysis will be statutorily required by ORS  
13 223.389 and Albany Municipal Code 15.04, before  
14 any actual costs can be assessed to the  
15 petitioner. Under these circumstances,  
16 petitioner's argument is not timely." Response  
17 Brief 10-11.

18 We agree with the city's analysis. There is  
19 substantial evidence in the record to justify the city's  
20 finding that there is a need for a local improvement  
21 district and that petitioner's development will both  
22 contribute to the need for those improvements and be  
23 benefited by them. The challenged condition requires  
24 nothing more of petitioner than his participation in a local  
25 improvement district for necessary future improvements to an  
26 intersection directly impacted by his proposed motel.  
27 Petitioner has established no basis for relief.

28 The third assignment of error is denied.

29 **FOURTH ASSIGNMENT OF ERROR**

30 Petitioner asserts the requirement that petitioner sign  
31 a waiver of remonstrance violates his federal and state  
32 constitutional rights to free speech, due process and equal  
33 protection. According to petitioner, by requiring him to

1 sign the waiver of remonstrance,

2 "[h]e is being required to give up his rights to  
3 free speech at City Council meetings, guaranteed  
4 to him by the First Amendment, and his right to  
5 due process to discuss the location of the  
6 facilities, the areas that will be included within  
7 the district, who will and who will not  
8 participate, and other issues relevant to the  
9 basic design and inception of a local improvement  
10 district without having any idea what factors will  
11 be taken into account at some future hearing."  
12 Petition for Review 9.

13 As explained in the city's response brief,  
14 "petitioner's concern that he is being singled out for  
15 special treatment and that he will be denied free speech  
16 opportunities are nothing more than hypothetical fears not  
17 based on any evidence in the record." Response Brief 13.  
18 We agree. Petitioner has established no violation of any  
19 state or federal constitutional right.

20 The fourth assignment of error is denied.

21 The city's decision is affirmed.