BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HALLMARK INNS AND RESORTS, INC.,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent.

LUBA No. 2002-049

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Mary Ellen Page Farr, Portland, filed the petition for review and argued on behalf of petitioner.

David D. Powell and Evan P. Boone, Lake Oswego, filed the response brief. Evan P. Boone argued on behalf of respondent.

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

AFFIRMED 09/26/2002

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

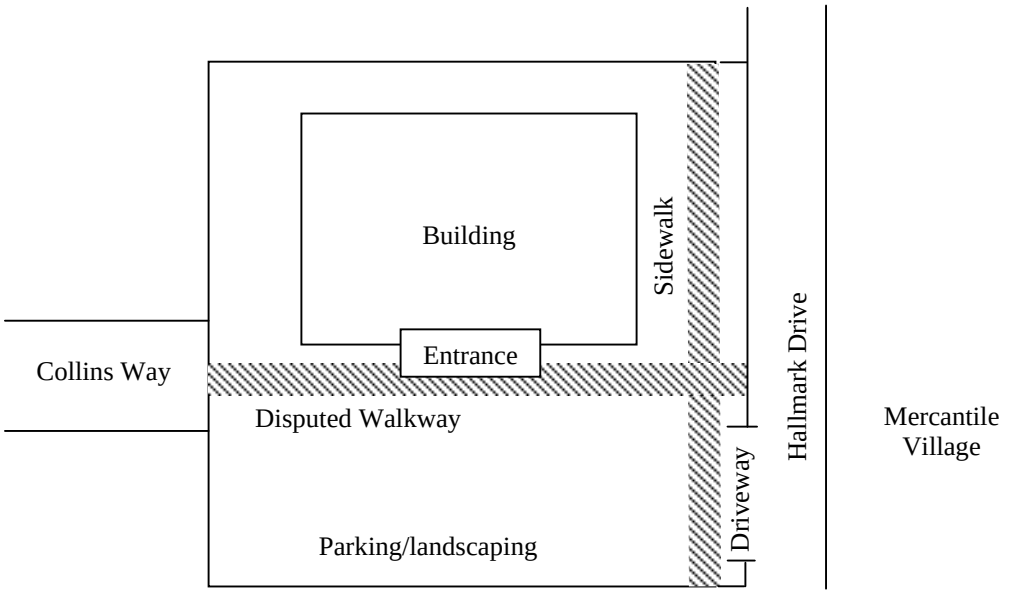
Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals the city's denial of its request for a modification of a development permit that was approved with conditions in 1993.

FACTS

Petitioner is a corporation that owns and operates hotels and resorts. Petitioner developed its corporate headquarters in 1993-1994 in the Mercantile Village area of Lake Oswego. The subject property is comprised of six lots, including a vacated portion of Collins Way that used to bisect the property. This portion of Collins Way was vacated before petitioner bought the property. Before it was vacated, Collins Way connected the Waluga residential neighborhood to the west with what is now Hallmark Drive, a north-south street that runs along the eastern edge of the subject property, and the Mercantile Village commercial area located across Hallmark Drive to the east. As part of the 1993 development approval of petitioner's headquarters, a sidewalk along the south-facing front of petitioner's corporate headquarters was approved in the approximate location of the vacated Collins Way right-of-way. The figure below depicts the relevant portions of the subject property.



The 1993 approval imposed a condition that required easements for public walkways, sidewalks, and public utilities. Petitioner provided an easement for the sidewalk that bordered the east side of its property, but petitioner did not provide an easement for the sidewalk that runs along the front of its corporate headquarters between Collins Way and Hallmark Drive (the disputed walkway). Although vehicular access to the parking lot for petitioner's corporate headquarters is exclusively from Hallmark Drive, the main entrance of the building is located west of Hallmark Drive, and the disputed walkway provides access to that main entrance.

The disputed walkway was open to the public from early 1994 to mid-1996. Petitioner constructed a fence at the western edge of the subject property where the walkway connected to Collins Way in mid-1996 due to increasing vandalism that petitioner attributed to the public use of the walkway. The fence had the effect of cutting off access to petitioner's property from the west. After petitioner erected its fence, the city cited petitioner for failing to comply with the above-described condition of development approval. Petitioner challenged the citation, and the parties agreed to hold the citation in abeyance in order to obtain a judicial resolution of the matter. Petitioner then filed suit in Clackamas County Circuit Court seeking a declaratory judgment that it was not required to provide an easement for the disputed walkway or, alternatively, for an award of compensation for a taking of private property. The circuit court abated its proceedings until a final decision on the present application to modify the condition of approval. The city design review commission denied petitioner's request for a modification. Petitioner appealed the design review commission's decision to the City Council, which affirmed the design review commission's decision. This appeal followed.

INTRODUCTION

The condition of approval that petitioner seeks to modify is Condition B(2), which states:

> "Prior to Issuance of Occupancy Permit, the Applicant Shall: [p]rovide easements for all public walkways/sidewalks and public utilities, including storm water detention and water quality facilities, to the satisfaction of City Engineer." Record 206.

Petitioner's modification request sought to: (1) clarify whether Condition B(2) actually applies to the disputed walkway; and (2) remove that easement requirement from the 1993 development permit if Condition B(2) does require such an easement.

The city's decision is somewhat equivocal about its answer to the first question. Planning staff recommended to the design review commission that the commission "assume that Condition B(2) requires a public pedestrian walkway/accessway." Record 91. In a footnote, the design review commission decision recognizes that petitioner had raised the issue of whether Condition B(2) even applies to the walkway that connects Collins Way with Hallmark Lane. The footnote states that the city manager, pursuant to local code provisions regarding interpretations, had concluded that Condition B(2) required that the walkway be dedicated to the city as an easement for public access.[1] *Id.* The city council decision states that, "to the extent [the issue] is before the Council * * *, Condition B(2) * * * should be interpreted to require a public easement over the [disputed walkway]." Record 14. Respondent suggests in its brief that the unappealed city manager decision resolves the question of whether Condition B(2) applies to the disputed sidewalks against petitioner as a matter of law. Respondent's Brief 6, 8. We reject the suggestion, because neither the design

[1] The footnote states:

> "Applicant's first argument is that the condition requiring easements for 'all public walkway/sidewalks' should not be construed as applying to the walkway that extends through the Applicant's property because it was not intended by the Applicant, and not shown on the plan as being a public walkway, and hence no easement need be given. Pursuant to [Lake Oswego Code (LOC)] 48.02.100(2), the City Manager is empowered to interpret the meaning and scope of approvals granted based on the record of the proceedings. The City Manager does not agree with Applicant's interpretation—based on the record, the Applicant's plan and original land use application narrative—the purpose of the walkway was represented to be open and available to the public and the approval was merely to require what the Applicant represented would be provided." Record 91.

review commission decision nor the city council decision purported to give the prior city manager decision preclusive legal effect. To the contrary, both the city council and design review commission assumed that the question was before them and both bodies adopted findings explaining why they interpreted Condition B(2) to apply to the disputed walkway. In other words, they answered petitioner's first question on its merits rather than concluding that the question has already been answered in an earlier, unappealed land use decision by the city manager.[2]

However, petitioner does not assign error to the city council decision that Condition B(2) requires that petitioner provide an easement to the disputed walkway to ensure public access. Instead, petitioner's assignments of error appear to take as given that Condition B(2) applies to the disputed walkway and requires that petitioner provide an easement to the city for the disputed walkway. Therefore, we do not address this seemingly critical threshold issue, even though resolution of that question in petitioner's favor could make the remainder of petitioner's assignments of error moot. *See Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000) (LUBA and the Court of Appeals do not review land use decisions *per se*; they review the arguments the parties make about land use decisions).

FIRST ASSIGNMENT OF ERROR

Lake Oswego Code (LOC) 49.58.1425 provides the approval criteria for modification of an approved permit:[3]

> "The City * * * may approve minor changes in any development permit, provided that such change:
>
> "(1) Does not increase the intensity of any use, or the density of residential use; and,

[2] We also note that as far as we can tell, the record in this matter does not include a copy of the referenced city manager decision.

[3] Subsequent to the decision in this case, the city reorganized its zoning ordinances. We will use the ordinances applicable at the time of the decision. *Former* LOC 49.58.1425 is now located at LOC 50.86.025.

"(2) Meets all requirements of the development standards and other legal requirements; and,

"(3) Does not significantly affect other property or uses; will not cause any deterioration or loss of any natural feature, process or open space; nor significantly affect any public facility; and

"(4) Does not affect any condition specifically placed on the development by action of a hearing body or City Council.

"Any change not meeting the criteria set forth above shall be processed as a new application. A change meeting the criteria shall be processed as a minor development."

The city found that elimination of the condition as it applies to the disputed walkway would violate Lake Oswego Development Standards (LODS) 20.020(2) or LODS 20.020(5) and, therefore, the modification could not meet all development standards, as required by LOC 49.58.1425(2). The city therefore denied petitioner's request.

A. LODS 20.020(2)

LODS 20.020(2) concerns "walkways" and provides:

"Walkways shall connect at least one public entrance of each building accessible to the public to the nearest public walkway or other walkway leading to a public walkway. Walkways shall also connect to other areas of the site, such as parking lots and outdoor activity areas, to other building entrances, to adjacent streets and nearby transit stops."

LODS 20.015(2) defines a "walkway" as:

"A surfaced strip of land, *legally accessible to the public*, improved to accommodate pedestrian traffic, including persons in wheelchairs." (Emphasis added.)

Petitioner argues that the city erred in interpreting LODS 20.020(2) to require that it provide a public easement for the disputed walkway. Petitioner states that the walkway (1) connects the building entrance to the public walkway on Hallmark Drive; (2) connects to other areas of the property; (3) can be used to access the building from the nearby transit stop, and therefore satisfies LODS 20.020(2). Petitioner also argues that LODS 20.020(2) can be satisfied with a *private* walkway from the building entrance to Hallmark Drive.

According to petitioner, the portion of the disputed walkway connecting to Collins Way is not required by any development standard, nor does any standard require that it deed the city a public easement. Petitioner argues that the city erred in interpreting LODS 20.020(2) otherwise.

The city interpreted the language of LODS 20.020(2) requiring walkways to connect to "adjacent *streets* and nearby transit stops" to require multiple connections if there are multiple streets that abut the property. When there are two streets that abut a property on opposite sides, as here, the city interprets LODS 20.020(2) to require a walkway to provide access between the two streets to connect the streets as well as provide access to petitioner's building. The city asserts that the purpose of LODS 20.020(2) also supports this interpretation. The purpose of LODS 20.020 is to "ensure that pedestrian and bicycle connectivity is ensured to promote alternate means of transportation in support of the many relevant goals and policies of the Lake Oswego Comprehensive Plan." Record 92. The city found that when a large site borders multiple streets, a walkway connecting the entrance to only one street would frustrate the purpose of pedestrian and bicycle connectivity by forcing pedestrians and bicyclists to go around the perimeters of the large site. The city rejected petitioner's suggestion of a private walkway because the definition of "walkway" requires that it be "legally accessible to the public." LODS 20.015(2). According to the city, a private walkway that can be gated off is not a walkway that is "legally accessible to the public."

The city has significant discretion in how it interprets its own development standards regarding the applicability of the requirement for walkways. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992). We must affirm the city's interpretation of its own legislation unless we conclude that the interpretation is clearly wrong. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). While petitioner's interpretation of LODS 20.020(2) may be plausible, the city's

interpretation is also plausible and therefore falls easily within its discretion to interpret its own ordinances.

B. LODS 20.020(5)

The city's alternative finding is that modification of Condition B(2) would also violate LODS 20.020(5) regarding "accessways," which provides:

> "Accessways for use by pedestrians and bicyclists shall be required when necessary to provide direct routes not otherwise provided by the existing right-of-way. Developments shall not be required to provide right-of-way for accessways off-site to meet this requirement. If right-of-way is otherwise available off-site, the developer may be required to improve an accessway off-site to the nearest transit route."[4]

The city found that the walkway is an "accessway" because it provides a "direct route not otherwise provided by the existing right-of-way," citing to evidence that alternative pedestrian routes between Collins Way and the Mercantile Village area ranged from 1,250 feet to 2,250 feet, compared to the 160-foot walkway. Petitioner argues that the disputed walkway cannot be an accessway because the definition of accessway requires a 15-foot right-of-way and an eight-foot-wide paved surface, while the disputed walkway is only five feet wide. The city responds that the accessway definition, requirement, and construction standards were adopted in 1998, after the original development permit but before the 2000 modification request.

Merely because a pre-existing, nonconforming accessway does not meet current construction standards does not render the requirement that access be provided in the manner described in LODS 20.020(5) inapplicable to petitioner's modification request. The city interpreted LOC 49.58.1425(2) to mean that a modification of a permit may be approved

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[4] LODS 20.025(6) provides that:

> "An accessway shall include at least a 15-foot wide right-of-way or easement and an 8-foot wide hard surface. For safety, accessways shall be as straight as practicable. Bollards, buttons, or landscaping shall be used to block motor vehicular access."

only on a showing that, with the modification, the approved development meets the access standards in effect at the time the modification is requested. Again, the city's interpretation falls easily within its allowed discretion, and we defer to it.

Petitioner's modification request may only be granted if it would not violate any development standards or other legal requirements. Under the city's interpretation of its ordinances, modification of the development permit would violate LODS 20.020(2) and (5). The city's interpretation is not clearly wrong. Therefore, the city did not err in denying the modification request for any of the reasons alleged in the first assignment of error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As we already noted, we assume for purposes of this appeal that Condition B(2) requires petitioner to deed the city an easement for the disputed walkway.[5] Petitioner argues that the denial of the modification request results in an unconstitutional exaction. *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

The parties agree that the city may require an exaction when the city demonstrates that (1) there is a public need; (2) there is an impact on public infrastructure and services caused by the proposed development; and (3) the exaction is roughly proportional to the proposed development. *Dolan*, 512 US at 391; Record 53. With respect to public need, petitioner contends that the city decided that it did not need an access from the terminus of Collins Way to Hallmark Drive when it vacated the Collins Way street segment in 1988. Petitioner argues that the city cannot now determine that an access is necessary and require that petitioner provide the access that the city voluntarily relinquished in 1988. Even if the city established that there is a need for pedestrian access across the subject property,

[5] Petitioner concedes that the condition clearly applies to the sidewalk that fronts Hallmark Drive on the east side of the subject property. Petitioner has already deeded an easement to the city for that access.

petitioner contends that it conveyed an easement for access along its eastern frontage and that that easement provides the necessary pedestrian access.

Petitioner further argues that if the city's decision does establish a need for a connection to Collins Way from the subject property, the requirement for the 160-foot by 5-foot walkway is not roughly proportional to the impact of its development because (1) the 17 employees who currently occupy the building do not use the public pedestrian walkways in the area and (2) the city improperly considered future uses of the property in its *Dolan* analysis.[6]

The city responds that the easement for access across the disputed walkway is not an exaction, because petitioner volunteered to provide pedestrian access to Mercantile Village from the Waluga neighborhood to respond to neighbors' concerns that they would be prevented from walking across the property to reach Mercantile Village. The city contends that when a property owner voluntarily relinquishes its property rights, no exaction occurs. The city also argues that even if the city's 1993 requirement that petitioner deed an easement for public access across its property is an exaction, the city's findings in the decision challenged in this appeal demonstrate that the exaction is responsive to an identified public need and that the exaction is roughly proportional to the impact of the proposed development on the city's transportation infrastructure. The city council's findings state, in relevant part:

> "**Is there a public need which a condition of approval, or in this instance, a continuation of a condition, is designed to address?**
>
> "1. The public need for pedestrian and bicycle access is evidenced by [the] Transportation Planning Rule[.]
>
> "2. The city has recognized the public need for pedestrian and bicycle access by the adoption of LODS 20, and its application to 'all minor and major developments involving the construction of a new

[6] Petitioner also argues that the requirement is contrary to the investment-backed expectations petitioner had when it purchased the property.

structure[.]' LODS 20.010, and specifically LODS 2.020(2) and 2.020(5), as cited by [the design review commission] in its [decision].

"**Does the development create or exacerbate the identified public need?**

"1. The Council finds * * * that the employees and customers who will be working in or conducting business within the development, will contribute to the pedestrian traffic on the City's sidewalk and pathway system. * * *

"2. Prior to the vacation of a portion of Collins [Way] in 1988, pedestrian and bicycle traffic had occurred from Collins [Way] and Waluga Park (west of the site) to and from * * * Hallmark Drive and Mercantile Village (east of the site). There was testimony in the [design review commission] proceedings that the vacation was undertaken to facilitate the development of the platted six lots that constitute the site, as well as, now, a part of vacated Collins [Way]. There is evidence, which the Council finds credible, that the vacation of a portion of Collins [Way] was done with the purpose of encouraging site development upon each of the six lots and the vacated portion of Collins [Way], and that in doing so, it was anticipated and intended that public pedestrian and bicycle traffic would be required within, and across, the development. Discontinuance of public pedestrian and bicycle access through the site would thus be contrary to the purposes of the vacation, and contrary to the preservation of pedestrian or bicycle access across the site.

"The platted six lots remained following the vacation of the portion of Collins [Way]. If the six lots had been developed separately, the City would have required some public access connecting through the site from Collins [Way] and Waluga Park to and from Hallmark Drive and Mercantile Village. Each individual lot development would have been required to install public sidewalks along the frontage of the lot.

"[Petitioner] chose to acquire all six lots and to develop them as a common site. A developer's decision to acquire multiple sites and commonly develop them should not allow the developer to avoid the obligation that would have been imposed upon the anticipated development of the six *separate* lots. In other words, the decision to commonly develop multiple lots can be said to itself create or exacerbate the identified public need, whereas if each lot were developed separately, a reasonable exaction for sidewalk purposes would have occurred for each developing lot to meet the public need for through pedestrian and bicycle access.

"* * * * *

"**Is the Condition (or continuation of the Condition) roughly proportional to that portion of the need created or exacerbated by the proposed development?**

"1. If the six lots had been developed separately, each of the lots would have been required to install a sidewalk running along its 60-foot frontage, for a total of 360 feet of sidewalk. The walkway required of [petitioner] is only 160 feet in length.

"2. The Council concurs with the [design review commission] findings, [which state:

"'* * * The nature of the large parcel burdens the public pedestrian and bicycle system by restricting movement and directing traffic over a large area. The Commission therefore concludes that this forces a greater use of the City's sidewalks and pathway system and as capacity diminishes along certain sectors of this pathway system, additional pathways must be added.

"'* * * * *

"'The [design review] commission finds that:

"'1. The distance of the walkway on the applicant's property is 160 feet.

"'2. The distance of hard-surfaced pedestrian system maintained from the Hallmark property to Waluga Park is approximately 1,250 feet. (Waluga Park is a "neighborhood activity center" located within one-half mile of the development * * * which current and future customers and employees of the structure would utilize and to which customers and employees of the adjacent Mercantile Village would be expected to utilize public accessways to access the Park.)

"'3. The distance of the pedestrian and bicycle system maintained from Mercantile Village * * * is 300 feet. (Mercantile Village is an adjacent shopping and commercial center, and transit stop location, which residents of the Collins Way area and greater neighborhood area use for their shopping and business service needs.)

"'4. The number of employees or customers that would potentially utilize the building is in excess of 44 (based on the number of parking spaces), especially when taking into consideration the ability of the owner to change use of the building to another, outright permitted use in the GC Zone.

> "'5. There are 20 residences on Collins Way, for which the occupants would access Waluga Park and [Mercantile Village]. Assuming an average of 2.5 persons per residence, 50 persons that reside on Collins Way may utilize the pedestrian and bicycle system.
>
> "'6. The amount of lineal footage of walkways required of residential development is a reasonable guideline to estimate the amount of pedestrian and bicycle usage that now exists or can be expected to exist. * * *' Record 99-100.]
>
> "[The city council] concludes that 160 feet of sidewalk is roughly proportional to the impacts on the pedestrian and bicycle system created by the development of the six lots as a common campus, and by the potential for more than 44 employees and customers working or doing business at the site and using the pedestrian and bicycle system." Record 14-17 (emphasis in original).

We disagree that petitioner volunteered to deed a public *easement* to ensure access through the subject property. There is evidence in the record that demonstrates that petitioner considered its connection between Collins Way and Hallmark Drive to be a revocable license, such that petitioner retained the right to exclude the public from the disputed walkway if it so chose. Record 259, 267-68. We do not believe that an agreement by petitioner to establish a walkway from the terminus of Collins Way past the entrance to petitioner's building and continuing on to Hallmark Drive can be interpreted as an unconditional agreement to grant a public easement for a sidewalk connecting Collins Way with Hallmark Drive.[7]

Turning to petitioner's remaining arguments, we agree with the city that there is a nexus between the requirement that petitioner grant an easement for access across its

[7] We raised with the parties the issue of whether the Court of Appeals' decision in *L.A. Development v. City of Sherwood*, 159 Or App 125, 977 P2d 392, *rev den* 329 Or 61 (1999) would support a conclusion that petitioner's challenge of Condition B(2) is now barred. In that decision, the Court of Appeals concluded that a developer may not accept the benefits of an approval and later challenge the constitutionality of conditions of approval that were not appealed. In view of our conclusion that petitioner did not understand Condition B(2) to require that it deed the city an easement for the disputed walkway, and our view that it is not entirely clear that Condition B(2) applies to the disputed walkway, we do not believe petitioner is barred now from challenging Condition B(2) as an unconstitutional taking of its property.

property and the city's policy regarding street connectivity, and that the exaction is roughly proportional to the impact the development has on the city's transportation system. The city determined that access across the subject property satisfied city requirements for connectivity, and presumably the city could have denied the application if that standard was not satisfied. *See* Record 217 (statement in the staff report in support of the 1993 decision that a pedestrian access across petitioner's property would satisfy site circulation standards). We therefore conclude that there is a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity. The fact that the city did not retain an access easement across Collins Way when the segment was vacated does not mean that the city could not later require that such an access be granted as part of a development approval, where the proposed development would have the effect of impeding access. We also agree with the city that the easement over the east side of petitioner's property does not address the connectivity issue that is addressed by requiring access across petitioner's property from the west to the east.

With respect to petitioner's argument that the city improperly based its requirement for pedestrian access on speculative future development, we disagree. We have held that a local government may consider those impacts that reasonably flow from the approval granted. *McClure v. City of Springfield*, 37 Or LUBA 759, *aff'd* 175 Or App 425, 28 P3d 1222 (2000). The city considered the impact that uses allowed on the property without further approvals would have on the pedestrian transit system and concluded that the building that is on the property could house up to 44 employees, at least some of whom would use the walkway to access Hallmark Drive or Collins Way. Record 98-99. In addition, there are residents of the Waluga neighborhood who could patronize the building, now or in the future, and would access the building by walking or by bicycle. The city properly considered those impacts when it determined the extent of the impacts that justify the exaction.

Finally, we agree with the city that the impact of the development of the subject property on the area's pedestrian and bicycle transportation system has been adequately quantified and establishes that the exaction is roughly proportional to the impact of the development. The findings set out earlier in this opinion consider the types of uses in the vicinity and conclude that the development would impede access from the west to the subject property, to the transit stop on Hallmark Drive and to Mercantile Village. The findings also explain that persons who work at or patronize petitioner's business or businesses in Mercantile Village would be impeded from accessing Waluga Park, a neighborhood attraction that lies to the west of the subject property. At least some of those persons could utilize the disputed walkway, and have used that walkway when it was open. In addition, the city finds that if the six individual lots were developed separately, the city would expect at least 360 feet of sidewalk to be provided for the public, and that petitioner's decision to combine the lots into one unitary development has impacts on the city's pedestrian system that the easement ameliorates. Given these findings, we conclude the city has adequately quantified the impact and the exaction, and could conclude, based on that quantification, that the exaction is roughly proportional to the impact of petitioner's development.

The second assignment of error is denied.

The city's decision is affirmed.