BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN,	)	
	)	
Petitioners,	)	LUBA No. 90-029
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CITY OF TIGARD,	)	
	)	
Respondent.	)	

Appeal from City of Tigard.

Joseph R. Mendez and Kathryn H. Clarke, Portland, filed the petition for review and a reply brief. With them on the brief was Knappenberger & Mendez. Joseph R. Mendez argued on behalf of petitioners.

Phillip E. Grillo, Portland, filed the response brief. With him on the brief was O'Donnell, Ramis, Elliott & Crew. James M. Coleman, Lake Oswego, argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 01/24/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a Tigard City Council resolution granting, with conditions, site development review approval and a variance allowing construction of a new retail sales building and parking lot to replace a smaller existing facility.

FACTS

Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan (plan) map and is zoned Central Business District - Action Area (CBD-AA). A 9,700 square foot retail sales building, occupied by an electric and plumbing supply business also owned by petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved parking lot. Fanno Creek flows through the southwestern corner of the subject parcel and along its western boundary.

Petitioners applied to the city for site development review approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the subject parcel.[1] Petitioners also requested a variance to applicable Tigard Community

[1]Petitioners proposed to demolish the existing 9,700 square foot building after the new building was completed and the electric and plumbing supply business moved into it.

Development Code (TCDC) parking requirements for general retail sale businesses, to allow provision of only 39, rather than 44, parking spaces.

The city planning director approved petitioners' site development review and variance application, imposing 14 conditions. The conditions included the following:

> "[Prior to the issuance of building permits t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. * * * The building shall be designed so as not to intrude into the greenway area."[2] Record 238.
>
> "[Prior to issuance of an occupancy permit t]he existing roof sign shall be permanently removed from the subject property." Record 239.

Petitioners appealed the planning director's decision to the planning commission, challenging five of the conditions imposed by the planning director, including the two quoted above.

After a public hearing, the planning commission approved petitioners' application with 12 conditions, including the first one quoted above. However, the planning commission modified the condition requiring removal of the roof sign on the existing building to provide that it "shall

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[2]The dedications required by this condition would comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 26.

be removed within 45 days of the issuance of the Occupancy Permit for the new building." Record 132. Petitioners appealed the planning commission's decision to the city council, challenging five of the conditions imposed, including the two quoted above.

After a further public hearing, the city council adopted a resolution denying the appeal and upholding the planning commission's decision.[3] This appeal followed.

MOTION TO FILE REPLY BRIEF

Pursuant to OAR 661-10-039,[4] petitioners request permission to file a reply brief addressing the following issues, which petitioners contend were raised for the first time in respondent's brief:

"1) Petitioners have failed to exhaust administrative remedies;

"2) Petitioners have failed to state a claim;

"3) Petitioners are required to challenge the City's comprehensive plan and development code;

"4) The remedy Petitioners seek is unclear;

"5) Petitioners are required to object to

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[3]The city council made a minor modification to one condition imposed by the planning commission which is not at issue in this appeal. The city council also adopted as its own the planning commission's findings of fact, analysis and conclusions. Record 28.

[4]OAR 661-10-039 provides:

> "A reply brief may not be filed unless permission is first obtained from the Board. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

statutes; and

"6) State and federal cases have been cited by Respondent which are not relevant and can be distinguished by Petitioners." Petitioners' Motion for Permission to File a Reply Brief 1.

Respondent objects to petitioners' motion and argues that points one through five above are not "new matters" raised for the first time in respondent's brief. Respondent argues that points one through four are simply arguments that petitioners failed to establish that all of the critical elements of a "takings" claim are satisfied. Respondent contends that point five above merely points out a weakness in petitioners' arguments in the petition for review. With regard to point six, respondent argues it is not necessary for petitioners to file a reply brief to distinguish cases cited by respondent, as that can be accomplished at oral argument.

We have interpreted OAR 661-10-039 "to require petitioners to demonstrate a need for a reply brief." Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 31, 1990), slip op 6-7; Kellogg Lake Friends v. Clackamas County, 17 Or LUBA 277, 281 (1988), aff'd 96 Or App 536, rev den 308 Or 197 (1989). We agree with petitioners that respondent's claim that petitioners failed to exhaust administrative remedies (point one above) was raised for the first time in respondent's brief, and warrants the filing of a reply brief.

However, with regard to points two and three above, these points were raised not only in respondent's brief, but also in respondent's Motion to Dismiss for Failure to State a Claim, filed the same day as respondent's brief. Petitioners addressed these points in their Memorandum in Response to Motion to Dismiss for Failure to State a Claim. Petitioners do not need an additional opportunity to respond to these points in a reply brief. Finally, points four through six above are not really new matters, but rather the type of argument in a response brief to which petitioners can adequately respond at oral argument.

Accordingly, petitioners' motion to file a reply brief is granted with regard to the issue of whether petitioners failed to exhaust administrative remedies, and is otherwise denied.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Respondent moves for issuance of an order dismissing this appeal on the grounds that petitioner has failed to state a claim upon which relief can be granted. Respondent argues that under their first and second assignments of error, petitioners allege that the appealed decision is an unconstitutional "taking" of private property for public use without just compensation, in violation of the Fifth Amendment of the U.S. Constitution and Article 1, Section 18 of the Oregon Constitution. Respondent contends that petitioners fail to allege in their petition for review

facts which, under state and federal law, are required elements of a takings claim.[5]

Petitioners maintain that a petition for review in a LUBA appeal is not a pleading like a complaint in a circuit court proceeding. Petitioners argue that no statute or administrative rule requires a petition for review to contain allegations of ultimate facts sufficient to constitute a claim for relief.

ORS 197.830(11) requires a petition for review to include:

> "(a) The facts that establish that the petitioner has standing;
>
> "(b) The date of the [appealed] decision;
>
> "(c) The issues the petitioner seeks to have reviewed."

ORS 197.835(1) requires LUBA to review the issues raised in a petition for review and issue a final order affirming, reversing or remanding the challenged land use decision. ORS 197.350(1) provides that a party appealing a land use decision to LUBA has the burden of persuasion. We agree with petitioners that there are no statutory or rule provisions which require a petition for review to conform

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[5]For instance, respondent complains that the petition for review fails to allege that the city's decision "destroys a major portion of the property's value" and "depriv[es the owners] of the property's economically valuable use," and fails to set out facts establishing the value of the property, the value of the business or the effects of the disputed condition on either. Memorandum in Support of Motion to Dismiss for Failure to State a Claim 2-3.

with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade us that there is a basis for reversal or remand of the challenged decision, we simply affirm the decision.

The motion to dismiss for failure to state a claim is denied.

FIRST ASSIGNMENT OF ERROR

> "The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year floodplain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions."

SECOND ASSIGNMENT OF ERROR

> "The city council's exaction of all portions of Petitioners' property falling within the 100 year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions."

A. Introduction

In the first and second assignments of error, petitioners challenge the validity of the condition imposed by the city requiring petitioners to dedicate to the city the portions of the subject parcel within the 100-year flood plain of Fanno Creek and within 15 feet to the east of the flood plain boundary. Petitioners argue that this condition of site development review approval constitutes a taking, without just compensation, of the 7,000 square feet of their parcel required to be dedicated for public use, in violation

of the Fifth Amendment to the U.S. Constitution and Article I, Section 18 of the Oregon Constitution. Fairly read, the petition for review asks that we either reverse the city's imposition of this condition or remand the decision to the city with instructions to remove the invalid condition.

The Fifth Amendment to the U.S. Constitution, made applicable to states and local governments through the Due Process Clause of the Fourteenth Amendment, provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

Article 1, Section 18 of the Oregon Constitution provides in relevant part:

> "Private property shall not be taken for public use * * * without just compensation * * *."

Petitioners base their federal taking claim on the argument that because the condition requires petitioners to permit physical occupation of the dedicated portion of their property, it constitutes a taking, regardless of the extent of the economic impacts on petitioners' use of their property. Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 435-436, 102 S Ct 3164, 73 L Ed2d 868 (1982). Petitioners contend that requiring such a taking without compensation, as a condition of development approval, is constitutional only if there is a sufficient nexus between the condition and the impacts of the proposed development.

Nollan v. California Coastal Comm'n, 483 US 825, 837, 107 S Ct 3141, 97 L Ed2d 677 (1987). The question presented in Nollan concerned a condition of approval for replacement of a dwelling with a larger structure. The condition of approval, which required an easement allowing public passage along the subject property between a seawall and the high tide line, was held to be unconstitutional because the condition lacked an essential nexus with the coastal commission's legitimate state interests, e.g., in protecting the public's ability to see the beach. Petitioners contend that such a nexus is lacking in this case.

With regard to petitioners' state taking claim, petitioners contend that the Oregon Supreme Court has never articulated a standard for applying Article I, Section 18 of the Oregon Constitution to conditions of development approval which constitute a physical taking (e.g., dedication of easement). Petitioners argue, however, that we should apply the "reasonable relationship" standard previously used by the Court of Appeals and this Board in other contexts to determine the validity of development exactions. Hayes v. City of Albany, 7 Or App 277, 285, 490 P2d 1018 (1971); O'Keefe v. City of West Linn, 14 Or LUBA 284, 293 (1986). Petitioners contend there is no "reasonable relationship" between the disputed condition requiring dedication of their property for a greenway and bike path and the impacts of the proposed development.

B. Ripeness

Respondent contends that petitioners' constitutional claims are premature because petitioners failed to exhaust their administrative remedies. Respondent argues that under Fifth Avenue Corp. v. Washington County, 282 Or 591, 581 P2d 50 (1978) (exhaustion doctrine requires plaintiff to seek quasi-judicial plan and zoning map amendments before claiming that plan and zoning provisions are unconstitutional as applied to plaintiff's property), whether petitioners exhausted their administrative remedies depends on the answers to three separate questions:

> "1. Were the nonjudicial remedies [to be] pursued by the plaintiff truly 'administrative' or were they legislative in nature?
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> "2. If 'administrative,' were these potential remedies truly available to the plaintiff at the time it filed suit?
>
> "3. If available, were they adequate to address plaintiff's desire to use the subject property as plaintiff wished?" Respondent's Brief 5.

According to respondent, petitioners' constitutional claims are premature because petitioners failed to seek a variance, pursuant to TCDC Chapter 18.134, from the provisions of the TCDC requiring dedication of petitioners' property for greenway and bike path purposes. Respondent argues that the variance process established in TCDC Chapter 18.134 satisfies the three-part Fifth Avenue Corp. test for availability of an administrative remedy because a

variance under TCDC Chapter 18.134 (1) is an administrative/quasi-judicial remedy, rather than a legislative one; (2) was available to petitioners when their application was filed, and remains available; and (3) if granted, could completely relieve petitioners from the disputed condition requiring dedication of a portion of their property.[6]

Petitioners contend they complied with the exhaustion requirement of ORS 197.825(2)(a).[7] Petitioners argue that because they appealed the planning director's decision on their application to the planning commission, and the planning commission's decision to the city council, every city decision maker acted on their application. According to petitioners, having pursued their application to the highest level city decision maker, they are not required to go back to the planning director and request a variance pursuant to TCDC Chapter 18.134. Petitioners rely on Portland Audubon Society v. Clackamas Co., 77 Or App 277, 280-281, 712 P2d 839(1986), which states that ORS 197.825(2)(a) is satisfied if a petitioner has gone to

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[6]Respondent also points out that pursuant to CDC Chapter 18.134, petitioners applied for a variance from certain CDC off-street parking requirements, and the appealed decision includes approval of that variance request.

[7]ORS 197.825(2)(a) provides that this Board's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

the highest local decision-maker once. Petitioners also cite Colwell v. Washington County, 79 Or App 82, 91, 718 P2d 747, rev den 301 Or 338 (1986), which states that ORS 197.825(2)(a) does not require pursuit of local remedies that are unlikely to serve any purpose except redundancy.

Petitioners contend that Fifth Avenue Corp., supra, is inapplicable here because in that case the Oregon Supreme Court applied the exhaustion of administrative remedies requirement to a claim that certain plan and code provisions were unconstitutional "as applied to the subject property in that they were 'arbitrary, capricious [and] unreasonable." (Emphasis in original.) Fifth Avenue Corp., 282 Or at 594. According to petitioners, the Court would not impose such an exhaustion requirement in this case, because petitioners' contentions are "directed to the validity of county [sic] acts without reference to the specific attributes of the subject property." Petitioners' Reply Brief 4.

Petitioners also contend that a variance pursuant to TCDC Chapter 18.134 was not an available or adequate remedy. TCDC 18.134.010 provides that a variance may be granted where "the literal interpretation of the provisions of the applicable zone would cause an undue or unnecessary hardship." (Emphasis added by petitioners.) Petitioners argue that they do not seek relief from any provision of the applicable CBD-AA zoning district. Petitioners further argue that no provision of the TCDC mandates that the city

require dedication of their property as a condition for approval of development authorized by the plan and TCDC. Petitioners maintain that they do not contend any TCDC provision is unreasonable as applied to their property and, therefore, seeking a variance would not have addressed the issue raised in this appeal.

We agree with petitioners that this appeal of the city council's decision satisfies the exhaustion requirement of ORS 197.825(2)(a), in that petitioners appeal a decision on their application made by the highest possible level of local decision maker. Further, as provided by ORS 197.015(10)(a)(A) and (B) and OAR 661-10-010, that decision became "final" when the decision was reduced to writing and signed by the decision maker. Accordingly, we have jurisdiction to review the appealed decision.[8]

However, we understand respondent to contend that petitioners' state and federal constitutional taking claims are not ripe for resolution because, unless petitioners attempt to obtain administrative relief through a variance pursuant to TCDC Chapter 18.134, petitioners have not obtained a final determination as to how the city will apply the TCDC provisions which mandate application of the disputed condition to their property. As we understand it, respondent contends that the requirement that a taking claim

[8]We note that in this appeal petitioners make only constitutional challenges to the city's decision.

be "ripe," as that concept has been explained in decisions of the federal and state appellate courts, requires that a petitioner seek local administrative remedies, such as variances, even though this Board has not in the past imposed a jurisdictional requirement that such remedies first be sought under the exhaustion requirement of ORS 197.825(2)(a) or the requirement of ORS 197.015(10)(a)(A) and (B) that the challenged land use decision be a final decision.

1. Federal Taking Claim

The United States Supreme Court has held that in order for a federal taking claim to be ripe for review, the property owner must obtain the local government's final determination as to how local regulations will be applied to his property. Agins v. Tiburon, 447 US 255, 100 S Ct 2138, 65 L Ed2d 106 (1980). In MacDonald, Sommer & Frates v. Yolo County, 477 US 340, 348, 106 S Ct 2561, 91 L Ed2d 285 (1986), the Supreme Court stated that ripeness is a requirement for judicial review of taking claims because a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[9]

[9]We note that the requirement that a taking claim be ripe for review has been applied by the Court not only where property owners seek money damages for an alleged taking, but also where property owners seek only declarative and injunctive relief from a local regulation. Pennell v. City of San Jose, 485 US 1, 108 S Ct 849, 99 L Ed2d 1 (1988) (action for declaratory and injunctive relief against city, attacking constitutionality of city rent control ordinance).

Furthermore the United States Supreme Court and other federal courts have held that takings claims are not ripe for review where property owners have failed to seek variances from applicable regulations which could have allowed them to develop their property as they wished. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 US 172, 189, 105 S Ct 3108, 87 L Ed2d 126 (1985) (Hamilton Bank); Hodel v. Virginia Surface Mining & Reclamation Assn., 452 US 264, 101 S Ct 2352, 69 L Ed2d 1 (1981) (Hodel); Lai v. City and County of Honolulu, 841 F2d 301, 303 (9th Cir. 1988); Kinzli v. City of Santa Cruz, 818 F2d 1449, 1453-1454, amended 830 F2d 968 (9th Cir. 1987), cert den ___ US ___, 108 S Ct 775, 98 L Ed2d 861 (1988).

In Hamilton Bank, supra, 473 US at 187, the United States Supreme Court quoted with approval the following passage from Hodel explaining why a taking challenge to a statute is not ripe where the property owners failed to seek administrative relief through variance and waiver procedures provided by that statute:

> "* * * If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." Hodel, 452 US at 297.

Also in Hamilton Bank, supra, 473 US at 190, the Court explained that its unwillingness to review taking claims

until property owners obtain a final decision with regard to how they will be allowed to develop their property is "compelled by the very nature of the inquiry required by the Just Compensation Clause." In Hamilton Bank, where property owners sought compensation for a regulatory taking, the inquiry required by the Just Compensation Clause concerned primarily the economic impacts of local regulations on the property owners' use of their property. The Court stated that such impacts "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Id.

The reasons for requiring that property owners seek administrative relief through an available variance process for a federal taking claim to be ripe for review, as expressed by the United States Supreme Court in Hamilton Bank, apply in this case as well. If a variance process were available under the TCDC which might relieve petitioners of all or part of the disputed condition, a mutually acceptable resolution with regard to petitioners' property might be reached. Furthermore, in this case petitioners' federal taking claim requires analysis of the nexus between the condition imposed, the purpose of the local regulations pursuant to which the condition is imposed and the impacts of the proposed development. Although the nature of this "Nollan" inquiry differs from that required

in Hamilton Bank, performing such a Nollan analysis also requires that the local government have "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[10] Hamilton Bank, 473 US at 190.

We, therefore, conclude that petitioners' federal taking claim is not ripe for review if the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see subsection 3 infra).

2. State Taking Claim

The Oregon Supreme Court has also interpreted Article I, Section 18 of the Oregon Constitution to require property owners to use available administrative procedures for development of their property before pursuing a state taking claim, stating that "if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken."[11] Suess Builders v. City of Beaverton, 294 Or 254, 262, 656 P2d 306 (1982). Also in Suess Builders, the Court cited with approval discussion in Fifth Avenue Corp., 282 Or at 614-621, requiring property

[10]The issue of ripeness was not raised in Nollan.

[11]Unlike the United States Supreme Court, which has described the ripeness requirement in terms of obtaining a "final determination" as to how regulations are applied, the Oregon Supreme Court has described what is essentially the same requirement in terms of "exhaustion of administrative remedies."

owners to seek quasi-judicial plan and zone map amendments before pursuing a claim that local regulations were unconstitutional as applied to their property. Finally, in Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987), the Court of Appeals rejected a property owner's taking claim where the property owner had failed to seek conditional use permits potentially available under local regulations.

While the Oregon Courts have not specifically addressed whether property owners must pursue a potentially available variance before pursuing a state taking claim, a variance is a type of administrative relief, and we see no significant difference between pursuing a variance and pursuing a plan or zone map amendment or a conditional use permit. We, therefore, conclude that petitioners' state taking claim cannot be upheld if the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see subsection 3 infra).

3. Availability of Relief under TCDC Ch 18.134

The disputed condition of approval provides:

> "The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property within 15 feet above (to the east

of) the 150.0 foot floodplain boundary. * * *"[12] Record 38.

In the absence of an adopted design plan, the TCDC Action Area overlay zone imposes the following requirement on the approval of new development:

> "The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:
>
> "(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. * * *
>
> "* * * * *" (Emphasis added.) TCDC 18.86.040.A.1.b.

Additionally, the TCDC site development review approval standards include the following:

> "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." (Emphasis added.) TCDC 18.120.180.A.8.

Finally, the city's Master Plan for Fanno Creek Park, which

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[12]The city's findings further indicate that the purpose of requiring dedication of property to the east of the existing flood plain boundary is to accommodate storm drainage improvements planned for in the city's Master Drainage Plan and the bike path shown on the city's Master Plan for Fanno Creek Park. Record 38.

has been adopted as part of the city's comprehensive plan, depicts a portion of petitioners' property adjoining Fanno Creek as greenway and shows the existence of a bike path on this portion of petitioners' property. Parks Master Plans, fig. 2.

Petitioners do not dispute the applicability of the above quoted TCDC provisions to the proposed development. It is clear that the disputed condition requiring dedication of a portion of petitioners' property was adopted pursuant to these TCDC provisions. Therefore, if the variance process of TCDC Chapter 18.134 is an available administrative means of obtaining relief from the above quoted provisions, petitioners are required to seek that relief before pursuing either a federal or state taking claim.

The purpose section of TCDC Chapter 18.134 states:

> "The purpose of this chapter is to provide standards for the granting of variances from the applicable zoning requirements of this title where it can be shown that, owing to special and unusual circumstances related to a specific piece of the land, the literal interpretation of the provisions of the applicable zone would cause an undue or unnecessary hardship, except that no use variances shall be granted." (Emphasis added.) TCDC 18.134.010.

We do not agree with petitioners' argument that the city's use of the phrase "literal interpretation of the provisions of the applicable zone," emphasized above, is a sufficient basis for concluding that the variance process of

TCDC Chapter 18.134 is applicable only to provisions of the TCDC's zoning districts, and not to provisions in the TCDC's Site Development Review Chapter, such as TCDC 18.120.180.A.8.[13] The purpose section of TCDC Chapter 18.134 also refers to granting variances from "the applicable zoning requirements of this title," indicating that a variance is potentially available from any provision of the TCDC. Further, TCDC 18.134.050.B and C indicates that variances to certain TCDC provisions (subdivision and access requirements) cannot be approved under TCDC Chapter 18.134. Thus, the TCDC indicates the two instances where the variance process of TCDC Chapter 18.134 is not applicable. We believe that if the city had intended TCDC Chapter 18.134 to be applicable only to the zoning district provisions of TCDC Chapters 18.40 to 18.86, it would have so indicated.

Because the variance process of TCDC Chapter 18.134 provides petitioners with a means of seeking administrative relief from the disputed condition requiring dedication of a portion of their property, and petitioners have not pursued that relief, petitioners' federal and state taking claims are not ripe for review.

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[13]We note that the TCDC 18.86.040.A.1.b(i) requirement for dedication of land for pedestrian and bike paths quoted above is a provision of the AA overlay zoning district and, therefore, would be subject to the variance process of TCDC Chapter 18.134 even under petitioners' interpretation of the applicability of TCDC Chapter 18.134.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The city's requirement that the 'roof sign' be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process."

The challenged decision includes the following condition:

> "The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building." Record 40.

Petitioners contend the "roof sign" referred to in the above quoted condition is a structural part of the existing building which is planned to be demolished after occupancy of the new building. Petitioners argue that it is unreasonable to require them to move their retail business into the new building, obtain a demolition permit and raze the existing structure, all within 45 days of receiving an occupancy permit for the new building. Petitioners state they told the city they would agree to a 90 day period, and complain that the city's decision does not articulate reasonable grounds for reducing that time period to 45 days.

Petitioners do not challenge the city's authority to require that they remove the existing roof sign as a condition of site development review approval. Rather, petitioners contend that allowing them only 45 days after obtaining an occupancy permit for the new building to accomplish removal of the sign, rather than 90 days, is a

"denial of due process." Petitioners presumably intend this phrase to indicate that the city's decision is unconstitutional in some way and, therefore, subject to reversal or remand under ORS 197.835(7)(a)(E). However, no argument supporting an allegation of unconstitutionality is provided in the petition for review. This Board has consistently declined to consider claims of constitutional violations where, as here, they are unsupported by legal argument. Van Sant v. Yamhill County, ___ Or LUBA ___ (LUBA No. 88-100, March 24, 1989), slip op 5; Faulkender v. Hood River County, 17 Or LUBA 360, 366 (1989); Portland Oil Service Co. v. City of Portland, 16 Or LUBA 255, 269 (1987); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 165-166 (1985).

The third assignment of error is denied.

The City's decision is affirmed.