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

WILLIAMS KOSTENBORDER, HUGH )  
HAMPTON, ANITA HAMPTON, and )  
PIONEER TRUST BANK, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF SALEM, )  
 )  
Respondent. )

LUBA No. 93-014  
  
FINAL OPINION  
AND ORDER

Appeal from City of Salem.

Mark L. DeLapp, Portland, filed the petition for review and argued on behalf of petitioners.

Paul A. Lee, Assistant City Attorney, Salem, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 06/11/93

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a city decision granting  
4 conditional tentative plan approval for a minor partition of  
5 commercially zoned property.

6 **FACTS**

7 Petitioners own a 2.29 acre parcel, which is planned  
8 and zoned for commercial use and is currently developed with  
9 a number of commercial buildings. The proposal would divide  
10 the 2.29 acres into three parcels. Parcels 2 and 3 would  
11 front on Silverton Road, a principal arterial street.  
12 Parcel 2 is presently developed with the "Country Corral"  
13 and a welding shop. Record 15. Parcel 3 is developed with  
14 a retail office and retail sales building. Parcel 1 is  
15 separated from Silverton Road by parcels 2 and 3. Parcel 1  
16 is developed with an automobile repair shop and a recreation  
17 hall. The remainder of parcel 1 is used for parking.

18 The proposal does not include any current plan for  
19 development or redevelopment of the subject property. The  
20 claimed purpose of the division of the subject property is  
21 to facilitate sale of the property to the existing users.  
22 The subject property is presently served by four separate  
23 entrances onto Silverton Road. In approving the request for  
24 tentative plan approval, the city imposed the following  
25 condition:

26 "Consolidate all access points into [a single] two  
27 way driveway located on the common property lines

1 separating parcels 2 and 3 and opposite the State  
2 Fairgrounds driveway to the south. The driveway  
3 may have a maximum of width of 40 feet. The  
4 driveway shall have reciprocal and irrevocable  
5 access rights for all parcels." Record 14.

6 Petitioners challenge the condition.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioners contend the city erroneously applied the  
9 Salem Transportation Plan in concluding that the challenged  
10 condition is justified for transportation safety reasons.

11 Respondent first points out that ORS 92.044  
12 specifically authorizes the city to adopt standards  
13 governing partitions, as required "for adequate provision of  
14 transportation \* \* \* needs" and "for lessening congestion in  
15 the streets[.]"<sup>1</sup> Salem Revised Code (SRC) 63.047(1)  
16 specifically authorizes imposition of conditions in granting  
17 tentative partition plan approval. SRC 63.047 provides, in  
18 pertinent part, as follows:

19 "(1) \* \* \* The planning administrator may approve,  
20 deny, or approve with conditions necessary to  
21 insure conformance with this chapter and the  
22 purpose set forth in SRC 63.020.

23 "\* \* \* \* \*

24 "(3) Before approval of a tentative plan, the  
25 planning administrator shall make affirmative

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<sup>1</sup>ORS 92.044 governs approval of subdivisions and of partitions in exclusive farm use zones. However, ORS 92.046 generally authorizes cities and counties to adopt standards governing partitions, and ORS 92.046(1) provides that the standards governing partitions under ORS 92.046 may include "the same requirements as are provided or authorized for subdivisions under ORS 92.010 to 92.190 \* \* \*."

1 findings that:

2 "(A) Approval does not impede the future use  
3 of the remainder of the property under  
4 the same ownership, or adversely affect  
5 the safe and healthful development of  
6 the remainder or any adjoining land or  
7 access thereto; and

8 "(B) The tentative plan complies with all  
9 applicable provisions of [the SRC]<sup>[2]</sup> \* \*  
10 \* and is in conformance with \* \* \* the  
11 Salem Area Comprehensive Plan.

12 "\* \* \* \* \*."

13 Respondent contends each of the above provisions  
14 provides authority for the city's decision in this matter.  
15 In its decision, the city explicitly relied upon the  
16 following Salem Transportation Plan provisions:

17 "To insure the provision of transportation  
18 facilities and services that reflect and support  
19 development patterns identified in the  
20 Comprehensive plan, that are timed to coincide  
21 with community needs, and that minimize the  
22 adverse impacts of traffic on residential areas."  
23 Goal, Salem Transportation Plan 83.

24 "10. Transportation facilities shall be designed  
25 and constructed to minimize adverse social,  
26 economic, environmental, and energy impacts  
27 and to encourage the use of public transit,  
28 bikeways, and walkways.

29 "11. Traffic movement on arterial streets should  
30 be facilitated by limiting or controlling  
31 access wherever possible." General Policies,

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<sup>2</sup>The Salem Transportation Plan is part of the SRC.

1 Salem Transportation Plan 85.<sup>3</sup>

2 The findings adopted by the city in support of its  
3 decision explain the need to minimize adverse impacts  
4 associated with multiple accesses on arterials as follows:

5 "Consolidating the multiple accesses would reduce  
6 the traffic and safety problems for the subject  
7 property. As Public [W]orks staff testified,  
8 limiting the conflict points by reducing the  
9 number of accesses helps reduce congestion,  
10 creates a safer arterial system, and increases  
11 driver expectancy for turning movements. This in  
12 turn lessens traffic impacts on neighboring  
13 residential areas. Imposition of the condition  
14 therefore is required to '[r]egulate access  
15 control on the major street system where safety  
16 [problems] and potentially adverse land use  
17 impacts may exist,' and insure the provision of  
18 services that support the development pattern in  
19 the area." (Salem Comprehensive Plan and Salem  
20 Transportation Plan citations omitted.) Record 6-  
21 7.

22 Petitioners do not dispute that reducing the number of  
23 entrances onto Silverton Road will improve safety.  
24 Petitioners' main complaint is that the proposed partition  
25 does not involve any current plans for new development.  
26 Moreover, petitioners argue the property is now developed  
27 and there is no reasonable basis for concluding the  
28 partition will result in more traffic being generated in the  
29 future. Therefore, petitioners reason, the condition is  
30 improperly based on supposition about what might happen in

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<sup>3</sup>In its brief, respondent also points out the Salem Transportation Plan additionally provides that "[m]any of the turning movements that disrupt efficient traffic flow are directly due to the proliferation of driveways on major streets." Salem Transportation Plan 105.

1 the future and not on any impacts reasonably attributable to  
2 the requested approval.

3 The city addressed the relationship between the  
4 partition and potential adverse traffic impacts as follows:

5 "[G]ranteeing the partition will reasonably lead to  
6 increased intensification of land use and  
7 aggravation of traffic safety problems. The \* \* \*  
8 applicants do not, by the partition itself,  
9 propose to intensify land activity. Nevertheless,  
10 such intensification is a reasonably foreseeable  
11 result of partitioning and the transfer of  
12 ownership.

13 "The record indicates that the partitioning is  
14 being sought for the purposes of financing and  
15 sale to a tenant. The record also reveals that  
16 many of the buildings on the subject property are  
17 quite old and reasonably subject to redevelopment.  
18 In addition, the northern part of the parcel is  
19 vacant and developable.

20 "The creation of three parcels for the purpose of  
21 transfer to third parties facilitates  
22 redevelopment and the potential for increased  
23 traffic associated with a higher traffic-  
24 generating use. Urban economics being what they  
25 are, \* \* \* new owners will look to the highest and  
26 best use of their property and may seek to  
27 redevelop the property without regard to the  
28 current intentions of the applicants.

29 "Consequently the \* \* \* partitioning reasonably  
30 will exacerbate the traffic safety problem and \* \*  
31 \* regulation of access points to facilitate safety  
32 and traffic on the fronting arterial is mandated  
33 by the Comprehensive Plan and Transportation Plan  
34 policies. Because the City cannot require  
35 consolidated access after the land is partitioned,  
36 it is acting now, while access controls are  
37 possible." (Salem Comprehensive Plan and Salem  
38 Transportation Plan citations omitted.) Record 7-  
39 8.

40 This Board has previously explained local governments'

1 obligations in imposing conditions of approval, such as the  
2 one challenged in this appeal proceeding, as follows:

3 "[T]he appropriate standard for review of approval  
4 conditions [is] whether the conditions are  
5 reasonable considering the evidence in the record.  
6 A reasonable condition is one which furthers a  
7 planning policy or goal and which arises out of  
8 the evidence in the record." Benjamin Franklin  
9 Dev. v. Clackamas County, 14 Or LUBA 758 (1986).

10 As we explained in Vestibular Disorder Consult. v. City of  
11 Portland, 19 Or LUBA 94, 102 (1990), "the city's findings  
12 and the evidentiary record supporting its decision to impose  
13 conditions of approval need only be sufficient to  
14 demonstrate that the conditions support or further a  
15 legitimate planning purpose."

16 The city's decision first sets out the SRC and Salem  
17 Transportation Plan provisions that it believes establish  
18 the planning concerns to be addressed by the condition. The  
19 city's findings then acknowledge that the current owners  
20 plan no additional development, but point out the existing  
21 buildings are old and the developed portions of the subject  
22 property, along with currently undeveloped portions of the  
23 property, could be redeveloped with uses that would generate  
24 additional traffic. The findings quoted above go on to make  
25 the important point that while consolidation of the existing  
26 four access points into a single access can be accomplished  
27 as a condition of partitioning approval at this time, after  
28 the partition is approved it may not be possible to require  
29 such consolidation in the future, when individual parcels

1 are developed or redeveloped.

2 The city's decision and the evidentiary record in this  
3 matter meet the tests articulated in Benjamin Franklin Dev.  
4 v. Clackamas County, and Vestibular Disorder Consult. v.  
5 City of Portland. The second assignment of error is denied.

6 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

7 Petitioners next allege the city improperly based its  
8 decision on street design standards contained in the Salem  
9 Transportation Plan.

10 Respondent concedes the Salem Transportation Plan  
11 street design standards apply to street construction  
12 projects and are inapplicable to the challenged decision.  
13 However, respondent contends that while at certain points  
14 during the local proceedings city staff referred to the  
15 Salem Transportation Plan street design standards, those  
16 standards were not relied upon by the city council in making  
17 the challenged decision. We agree with respondent.

18 The first and third assignments of error are denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 Petitioners allege the challenged condition constitutes  
21 an unconstitutional taking of their property.<sup>4</sup> Again,  
22 petitioners' central thesis is that the partition will have  
23 no impacts which warrant the conditioning of the requested

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<sup>4</sup>Petitioners do not explain whether their taking claim is based on the Fifth Amendment to the U.S. Constitution or on Article I, section 18, of the Oregon Constitution. The cases cited by petitioners concern both, and we therefore assume petitioners' taking claim relies on both constitutions.

1 approval on eliminating three of the existing four accesses  
2 onto Silverton Road and providing access by way of a single  
3 improved access. We reject the argument.

4 Petitioners' taking claim assumes that a cognizable  
5 property interest is taken by the city's condition of  
6 approval. Respondent disputes that assumption and argues  
7 that while petitioners may have a property right to  
8 reasonable access to Silverton Road, they do not have a  
9 cognizable property right to the existing four accesses. We  
10 agree with respondent.

11 In City of Salem v. Merritt Truax, 70 Or App 138, 688  
12 P2d 120 (1984), the city condemned a narrow strip along a  
13 corner lot as part of a street widening project and  
14 thereafter closed one of the three driveways serving the  
15 lot. The owner of the lot claimed its access had been  
16 inversely condemned. The trial court granted a directed  
17 verdict on the inverse condemnation claim. The court of  
18 appeals affirmed, explaining the owner's lack of a  
19 cognizable property right as follows:

20 " \* \* \* An owner of land abutting a street has a  
21 common law right to access his property from the  
22 road. Oregon Investment Co. v. Schrunk, 242 Or  
23 63, 408 P2d 89 (1965); Boese v. City of Salem, 40  
24 Or App 381, 595 P2d 822, rev den 287 Or 507  
25 (1979). However, the rights of abutting  
26 proprietors to access to their premises are  
27 subservient to the public's right to free use of  
28 the streets. That right is protected by the  
29 state's exercise of its police power. Oregon  
30 Investment Co. v. Schrunk, supra, 242 Or at 67;  
31 Boese v. City of Salem, supra, 40 Or App at 383.

1 An interference with access rights that is an  
2 exercise of the city's police power is not a  
3 compensable taking.

4 "It is well settled that changing a public road to  
5 provide for public safety and convenience is a  
6 legitimate exercise of a city's police power.  
7 Thus, we conclude that the closure of defendants'  
8 driveway was not a compensable taking. Oregon  
9 Investment Co. v. Schrunk, supra; Argo Investment  
10 v. Dept. of Transportation, 66 Or App 430, 674 P2d  
11 620 (1984); Boese v. City of Salem, supra.  
12 Defendants point out that the change in driveways  
13 has made it less convenient to enter the station  
14 and has resulted in a decline in business. The  
15 closure has also made it harder for defendants to  
16 get fuel, because it must now be specially  
17 delivered because tanker trucks can no longer pull  
18 into the station. Those matters are damnum absque  
19 injuria and are not compensable. Oregon  
20 Investment Co. v. Schrunk, supra, Boese v. City of  
21 Salem, supra." Merritt Truax, supra, 70 Or App at  
22 140.

23 As was the case with the city decision challenged in  
24 Merritt Truax, the city's decision in this case to require  
25 closure of three of the four existing access points is a  
26 legitimate exercise of its police power to address traffic  
27 safety issues. We reach that conclusion regardless of  
28 whether the impacts of the partition warrant such a  
29 condition as part of the city's partitioning decision.<sup>5</sup>  
30 More importantly, for purposes of this case, and for the

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<sup>5</sup>Petitioners concede a single access point would be safer than the existing four accesses and that the closure of three of the existing accesses furthers a legitimate public interest in traffic safety. Petition for Review 15. As already noted, petitioners' complaint is that they do not believe the impacts of the partition, viewed alone, warrant imposition of the challenged condition.

1 reasons explained by the court of appeals in Merritt Truax,  
2 we agree with respondent that the city's requirement that  
3 three of the four existing driveways be closed does not  
4 extinguish a cognizable property right. The condition  
5 simply requires that petitioners exercise their property  
6 right (i.e. their right of access onto Silverton Road)  
7 differently. No property right has been taken by the city's  
8 action and, therefore, the city's action could not  
9 constitute an unconstitutional taking of petitioners'  
10 property.

11 Even if conditioning approval of the partition on  
12 combining the existing four accesses into a single improved  
13 access could be construed as taking a property right, and  
14 even if the condition is properly viewed as an "exaction,"  
15 we agree with respondent that the condition does not  
16 constitute an unconstitutional taking of that property right  
17 under Nollan v. California Coastal Comm'n, 483 US 825, 107 S  
18 Ct 3141, 97 L Ed2d 677 (1987).

19 In Dolan v. City of Tigard, 113 Or App 162, 164-65, 832  
20 P2d 853, rev allowed 314 Or 573 (1992), the Oregon Court of  
21 Appeals explained the U.S. Supreme Court's decision in  
22 Nollan essentially requires three inquiries. First, is  
23 there "a legitimate governmental interest that the  
24 regulation that authorizes the condition is designed to  
25 serve?" Second, do "the regulation and the condition  
26 'substantially advance' that interest?" Third, does the

1 exaction or condition imposed have a sufficient relationship  
2 to with the impacts or public need properly attributable to  
3 the development? In applying the third inquiry to a case  
4 involving a requirement for dedication of right of way for a  
5 pedestrian and bicycle path as a condition of a permit to  
6 remove an existing commercial building and replace it with a  
7 larger more intense commercial use, the court of appeals in  
8 Dolan explained the third inquiry is satisfied if there is a  
9 "reasonable relationship" between the required dedication  
10 and the intensified use and impacts.

11 Petitioners do not dispute that the first two inquiries  
12 are properly answered in the city's favor in this case.  
13 Again, petitioners' thesis is that because no immediate  
14 plans exist for new development or redevelopment of the  
15 subject property, the city may not assume such new  
16 development or redevelopment will occur in the future or  
17 conclude that such new development or redevelopment  
18 justifies the disputed condition. For the same reasons we  
19 stated in our discussion of the second assignment of error,  
20 supra, we do not agree.

21 All that is required under Nollan and Dolan is that  
22 there be a reasonable relationship between the development  
23 potential and impacts reasonably attributable to the divided  
24 parcel on the one hand, and the city's need to respond to  
25 legitimate traffic concerns on the other. Such a reasonable  
26 relationship exists here, notwithstanding the lack of

1 current plans to develop the property further. Moreover,  
2 the increased difficulty of addressing such concerns in the  
3 future, when there are three parcels rather than a single  
4 parcel, makes the city's decision to address its concerns as  
5 part of the partitioning decision particularly appropriate.

6 The fourth assignment of error is denied.

7 The city's decision is affirmed.