

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ART PICULELL GROUP,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent.)
13

LUBA No. 95-092
FINAL OPINION
AND ORDER

14
15 Appeal from Clackamas County.
16

17 Jeff H. Bachrach, Portland, filed the petition for
18 review and argued on behalf of petitioner. With him on the
19 brief was O'Donnell Ramis Crew Corrigan & Bachrach.
20

21 Michael E. Judd, Chief Assistant County Counsel, Oregon
22 City, filed the response brief and argued on behalf of
23 respondent.
24

25 GUSTAFSON, Referee; LIVINGSTON, Chief Referee,
26 participated in the decision.
27

28 AFFIRMED 02/14/96
29

30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner challenges the county's imposition of a
4 condition to a subdivision approval.

5 **FACTS**

6 Petitioner applied to the county for approval of a 19-
7 lot subdivision bordering Summers Lane, a county maintained
8 road. Eighteen of the lots are south of Summers Lane. Lot
9 19, at the west end of the proposed subdivision is north of
10 Summers Lane. At that west end, Summers Lane traverses the
11 proposed subdivision for approximately 130 feet. East and
12 west of the proposed subdivision, Summers Lane is fully
13 developed, or has been approved for full development, as a
14 60-foot right-of-way, with a 36-foot pavement width. Where
15 Summers Lane borders the proposed subdivision, it is
16 partially improved, with a 40-foot right-of-way.

17 The proposed subdivision is not dependent exclusively
18 on Summers Lane for access. However, there is evidence that
19 81% of the traffic from the proposed subdivision will use
20 Summers Lane. In addition, traffic from an adjoining
21 subdivision will have access to Summers Lane through this
22 subdivision development.

23 In approving the proposed subdivision, the county
24 hearings officer originally required, as a condition of
25 approval, full street improvement of Summers Lane (60-foot
26 right-of-way and 36-foot pavement width) along the entire

1 length of the subdivision, which would match the road's full
2 development at either end of the subdivision. Petitioner
3 appealed the imposition of that condition to LUBA. After
4 the appeal was filed, the Supreme Court issued its decision
5 in Dolan v. City of Tigard, ___ US ___, 114 S Ct 2309, 129 L
6 Ed 2d 304 (1994). The county subsequently requested and was
7 granted a voluntary remand to reconsider the challenged
8 condition.

9 After an additional hearing on remand, the hearings
10 officer reapproved the subdivision, and modified the
11 challenged condition to require a 10-foot property
12 dedication and two-thirds street improvements along the
13 eastern four-fifths of the subdivision (that portion which
14 borders Summers Lane only on the south) and full street
15 improvements along the western 130 feet of the proposed
16 subdivision (that portion which is traversed by Summers
17 Lane).

18 Petitioner again appeals the imposition of that
19 condition.¹

20 **ASSIGNMENT OF ERROR**

21 Petitioner makes one assignment of error: Condition 1A
22 constitutes an unconstitutional taking because the county
23 has not established the requisite "rough proportionality"

¹The challenged decision also includes conditions requiring improvements to other adjoining roads, upon which the subdivision is dependent, or partially dependent, for access. Petitioner does not challenge those other conditions.

1 between the impacts of the proposed development and the
2 burden imposed on petitioner, as required by Dolan.²

3 The Dolan rough proportionality test places the burden
4 on the local government to "make some sort of individualized
5 determination that the required dedication is related both
6 in nature and extent to the impact of the proposed
7 development" when it adopts conditions requiring land
8 dedications to discretionary land use approvals. Dolan, 114
9 S. Ct at 2320.³ In explaining how the rough proportionality
10 test applied to the City of Tigard's condition requiring a
11 pedestrian/bicycle path in Dolan, the U.S. Supreme Court
12 stated:

13 "No precise mathematical calculation is required,
14 but the city must make some effort to quantify its
15 findings in support of the dedication for the
16 pedestrian/bicycle pathway beyond the conclusory
17 statement that it could offset some of the traffic
18 demand generated." Id. at 2322.

²The challenged condition states:

"The developer shall dedicate 10 feet of additional right-of-way to Summers Lane from the east boundary of the plat to the west line of Tax Lot 905 * * * and shall construct a 2/3 street improvement, including 24 feet of pavement with curb and sidewalk along the property frontage to 118th Court. The developer shall dedicate additional right-of-way as necessary to create 60 feet of right-of-way from 118th Court to the western boundary of the plat, and shall construct this section of Summers Lane to collector road standards." Record 2.

³The Supreme Court's opinion in Dolan was limited to conditions which require dedications of real property. However, the Oregon Court of Appeals has extended the Dolan rough proportionality test to apply as well to conditions requiring improvements to public property. Clark v. City of Albany, 137 Or App 293, 904 P2d 185 (1995); J.C. Reeves v. Clackamas County, 131 Or App 615, 887 P2d 360 (1994).

1 The Dolan rough proportionality test includes two
2 components: The local government must consider both the
3 nature of the exaction, i.e. whether there is an adequate
4 nexus between the legitimate state interest and the
5 exaction; and the extent of the impact, i.e. whether there
6 is a close enough connection or fit between the exaction and
7 the anticipated impact of the development. In this case,
8 whether the challenged condition is related in nature to the
9 proposed development is not at issue. Petitioner
10 acknowledges there is an adequate nexus between the county's
11 legitimate interest in providing a safe and efficient
12 roadway network and the condition imposed to facilitate that
13 network. Rather, the sole issue here is the extent of the
14 impact. Petitioner contends that there is not a close
15 enough connection between the impact of petitioner's
16 subdivision on Summers Lane and the county's legitimate
17 interest in providing a safe and efficient roadway network.

18 Petitioner argues this situation is similar to that
19 reviewed in Schultz v. City of Grants Pass, 131 Or App 220,
20 884 P2d 569 (1994) where the Oregon Court of Appeals
21 concluded that the required degree of connection was absent.
22 We disagree with petitioner. The county's condition in
23 Schultz failed to establish the required connection because
24 it was based on the potential development of a proposed
25 partition rather than on the proposed development. The
26 court explained:

1 "The proposed development in this case is the
2 partitioning of a single lot into two lots and
3 nothing more. There is absolutely nothing in the
4 record to connect the dedication of a substantial
5 portion of petitioner's land for the purpose of
6 widening city streets, with petitioner's limited
7 application." Id. at 228.

8 The court concluded that an increase of eight cars per day,
9 which the proposed development would create, did not justify
10 an exaction of 20,000 square feet of the petitioner's
11 property.

12 The court's analysis in Schultz is inapposite here.
13 The hearings officer's evaluation of the impacts of
14 petitioner's proposed development are limited to the precise
15 manner in which petitioner desires to develop his property
16 and are not in any way reliant upon some future potential
17 development. Rather, from a factual perspective, this case
18 is more analogous to J.C. Reeves, 131 Or App 615.

19 In J.C. Reeves, the Oregon Court of Appeals elaborated
20 on the rough proportionality test in rejecting the
21 petitioner's contention that road improvement conditions
22 should be measured by a formula which compares the traffic
23 generated from the proposed subdivision with the volume of
24 traffic that travels on a larger segment of the road.
25 There, the petitioner argued that since the projected
26 traffic from its proposed subdivision would increase the
27 traffic on the affected road by only 6.2%, there was no
28 rough proportionality and, in fact, the developer should be
29 responsible for only 6.2% of the road improvements the

1 county was demanding. The court stated:

2 "We agree with the hearings officer that, instead
3 of the one petitioner proposes, the appropriate
4 comparison is between the traffic and other
5 effects of the subdivision and the subdivision
6 frontage improvements that the county has
7 required." J.C. Reeves, 131 Or App at 622.

8 Notwithstanding that explicit rejection, petitioner
9 here makes the same argument: to satisfy the rough
10 proportionality test, the county must establish that the
11 extent of the improvements on Summers Lane are
12 mathematically proportional to the impact of traffic on
13 Summers Lane generated by the proposed development.
14 Petitioner argues that only 2.6% of the total traffic
15 anticipated to use Summers Lane at full build-out will be
16 generated by the proposed development. On that basis, he
17 argues he should have to contribute only 2.6% of the cost of
18 those improvements.

19 Petitioner also identifies other individual bases for
20 the hearings officer's conclusion, and argues each of these
21 bases either fails or is irrelevant to establish the
22 requisite rough proportionality. Petitioner concludes the
23 hearings officer's analysis and finding that the burden of
24 the condition on petitioner is minimal is irrelevant. Also
25 irrelevant, according to petitioner, is the hearings
26 officer's analysis and findings regarding the benefit
27 petitioner will gain from the condition. Finally,
28 petitioner disagrees with the hearings officer's analysis

1 and conclusion that the required improvements are necessary
2 to provide safe and convenient access to the development.
3 After discounting the hearings officer's analyses,
4 petitioner concludes:

5 "The findings do not include any attempt to
6 quantify the specific impacts that will result
7 from the proposed subdivision. They are further
8 flawed by the absence of any explanation about why
9 the exaction is roughly proportional, both in
10 nature and extent, to the impacts of petitioner's
11 development." Petition for Review 18.

12 The essence of petitioner's argument is that the county has
13 not established rough proportionality because the hearings
14 officer did not rely on a mathematical quantification of the
15 impacts in reaching his conclusion.

16 As explained in the county's response brief,
17 petitioner's premise ignores a fundamental basis from which
18 development impacts are properly assessed:

19 "The percentage approach relied on by petitioner
20 was rejected by the Court of Appeals for good
21 reason. It is conceptually flawed, as can be
22 illustrated by a simplified example. Assume an
23 area composed of ten similar ownerships zoned for
24 future subdivision development, which need a new
25 road for access. The owner of the first parcel to
26 be developed adopts petitioner's theory that
27 because his subdivision will only generate one-
28 tenth of the total traffic on the road, and [sic]
29 he should be required to pay for only one-tenth of
30 the road segment bordering his property. Each of
31 the other nine developers makes the same argument.
32 If this approach is accepted, the result is that
33 while the ten subdivisions will generate all the
34 traffic on the new road, they have only paid for
35 one-tenth of its cost. The obvious logical
36 alternative is that each development is
37 responsible for its own segment of the road,

1 thereby paying its fair share of the total road
2 cost." Response Brief 6.

3 We agree with the county's analysis. Rough
4 proportionality is more than a simple mathematical equation
5 as to the number of cars generated by development. Rather,
6 as we understand the Court of Appeals' explanation of the
7 Dolan test as applied in J.C. Reeves, the "comparison
8 between the traffic and other effects of the subdivision and
9 the subdivision frontage improvements that the county has
10 required" is a mechanism to determine a developer's "fair
11 share of the total road cost." The county is not required
12 to artificially isolate proposed development. Rather, rough
13 proportionality allows the county to consider the
14 subdivision's real traffic impacts to the adjoining road
15 generally in assessing the extent of frontage improvements
16 necessary to alleviate the impact.

17 The traffic impacts of this subdivision will not be
18 limited to that portion of Summers Lane upon which the
19 subdivision fronts. The developer is not required to
20 alleviate these impacts beyond the boundaries of the
21 proposed development, but his "fair share" rightfully
22 includes traffic related impacts by subdivision residents
23 beyond that portion of Summers Lane fronting the
24 subdivision. Consideration of those impacts requires more
25 than a mathematical calculation of the number of cars
26 driving on an isolated segment of Summers Lane. Thus, we
27 reject petitioner's contention that we should limit our

1 evaluation to the mathematical calculation that would limit
2 his obligations to a fraction of the actual impacts of the
3 development on the surrounding road infrastructure.

4 We also reject petitioner's contention that the
5 hearings officer's examination of both the benefits and the
6 burdens of the exaction are irrelevant to the evaluation of
7 rough proportionality. Both are relevant and appropriate
8 considerations in articulating whether there is a sufficient
9 connection between the proposed development and the required
10 improvements to justify the exaction. In fact, the doctrine
11 of unconstitutional conditions speaks in those terms. As
12 the Court stated in Dolan,

13 "Under the well-settled doctrine of
14 'unconstitutional conditions,' the government may
15 not require a person to give up a constitutional
16 right -- here the right to receive just
17 compensation when property is taken for a public
18 use -- in exchange for a discretionary benefit
19 conferred by the government where the property
20 sought has little or no relationship to the
21 benefit." Dolan, 114 S Ct at 2316.

22 Thus, the relationship between the benefit the developer
23 receives and the property that is exacted in exchange for
24 the benefit is an appropriate part of the hearings officer's
25 evaluation.

26 So too is the extent of the burden the condition
27 imposes on the developer. The evaluation requires
28 considering the connection between what is being asked of
29 the developer and the impacts his development will create.
30 The question of what is being asked of the developer can

1 equally be phrased as what burden is being placed on the
2 developer. The hearings officer's evaluation of the burdens
3 is, therefore, also relevant and supports his determination
4 that the challenged condition is not an unconstitutional
5 taking.

6 In J.C. Reeves, the court recognized that findings
7 required to satisfy the Dolan rough proportionality test are
8 not functionally different than the findings already
9 required to justify local government decisions. Rather,
10 "the requirements for findings under Oregon's land use
11 decisional scheme may often amount to the practical
12 equivalent of a burden of articulation on local bodies that
13 does not differ materially from what Dolan requires." Id.
14 at 620. Thus, the inquiry remains whether the findings are
15 adequate to support the conclusion.

16 We need not determine whether each one of the county's
17 findings independently could satisfy the rough
18 proportionality test. Rather, we must determine whether
19 cumulatively, the county's findings establish that there is
20 a sufficient connection between the impacts of the
21 development petitioner proposes and the dedication and
22 frontage road improvements the county is requiring.

23 The hearings officer's findings justifying the
24 imposition of Condition 1A conclude there is a rough
25 proportionality between the impacts of the proposed
26 development and the challenged condition. The hearings

1 officer found that the exaction at issue, requiring a
2 dedication of 10 feet of property along the north edge of
3 the property to allow improvements to Summer Lane, will not
4 reduce the number of lots allowed. He also determined that
5 the required improvements will cost the developer
6 approximately \$50,000. Those improvements will offset the
7 direct impact of the development on Summers Lane, and
8 directly benefit 81% of the residents of the proposed
9 development. The hearings officer articulated why the
10 exaction was both necessary and proportionate to the impacts
11 of the development on Summers Lane by examining the
12 connection between what was being required of the developer
13 and the impact of his proposed development. The hearings
14 officer did the analysis and evaluation Dolan requires.

15 We conclude that the county's findings are adequate to
16 establish that the required dedication and improvements are
17 sufficiently related, in extent as well as in nature, to the
18 proposed development to satisfy the Dolan rough
19 proportionality test.

20 The assignment of error is denied.

21 The county's decision is affirmed.