BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINCOLN CITY CHAMBER OF COMMERCE and OREGONIANS IN ACTION LEGAL CENTER,	)	
Petitioners,	)	LUBA No. 98-153
vs.	)	FINAL OPINION
CITY OF LINCOLN CITY,	)	AND ORDER
Respondent.	)	

Appeal from Lincoln City.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioners.

Christopher P. Thomas, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Moskowitz and Thomas.

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

AFFIRMED 07/14/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the city's legislative amendments to its land use regulations.

FACTS

On August 10, 1998, the city adopted Ordinance 98-11, which approved a series of amendments to Lincoln City Zoning Ordinance (LCZO). In relevant part, Ordinance 98-11 amended LCZO 4.300(1) to specify a set of dedications and infrastructure improvements required for development applications.[1] For purposes of this opinion, we follow petitioners

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[1]LCZO 4.300(1) provides in relevant part:

> "No building permit shall be issued for the addition, alteration, or repair, within any twelve month period exceeding fifty (50) percent of the assessed value or market value, whichever is greater, of an existing building or structure, or for a new building or structure in connection with any permitted or conditional use within any zone as described in this ordinance, and no site plan approval shall be granted for development for which site plan review is required under Section 4.310, unless and until:
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> "(a) The applicant submits, as part of a building permit application, a site plan drawn to scale showing the nature, size, and location of [proposed buildings, improvements, access, utilities, easements, and drainage facilities, and existing utilities, easements, drainage facilities, and existing lot lines]; and
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> "(b) The applicant agrees:
>
> "(i) To install curbs and gutters along adjacent streets not having curbs and gutters, and also to pave the roadways from the curbs to 12 feet beyond centerline of unpaved or partially unpaved streets contiguous to the property to be developed * * *; and, if existing rights-of-way for streets contiguous to the property are not adequate in width * * * to dedicate right-of-way to the City sufficient to allow streets that are adequate in width;
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> "(ii) To dedicate to the City utility easements five (5) feet in width along rear lot lines, or along front lot lines as required by the City;
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> "(iii) To dedicate easements for drainage purposes, and provide storm water detention, treatment, and drainage features and facilities * * *;
>
> "(iv) To install sidewalks five (5) feet in width along boundaries contiguous with streets, within existing right-of-way if adequate in width; and, if existing easements are not adequate in width, to deed easements to the City sufficient to allow sidewalks five (5) feet in width;
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> "* * * * *"

in describing that set of dedications and improvements as the "boilerplate exactions." The boilerplate exactions in LCZO 4.300(1) are essentially the same as the standards that preexisted Ordinance 98-11. More importantly, Ordinance 98-11 amended LCZO 4.300(2) to require that, if an applicant intends to assert that the boilerplate exactions cannot legally be required, the applicant must submit a "rough proportionality" report prepared by a qualified civil or traffic engineer.[2] Further, Ordinance 98-11 amended LCZO 4.310(5)(g) to impose a similar requirement where an applicant objects to the easements or improvements imposed as a condition during site plan review.

The city council drafted an annotation to Ordinance 98-11 that explains the intended effect of the amendments to LCZO 4.300:

> "Under the [pre-amendment site plan review provisions], in order to obtain a building permit or site plan approval, the applicant must meet the requirements of [pre-amendment LCZO 4.300] for the provision of easements and public infrastructure. Some of the requirements, as applied to particular buildings or developments, may exceed what the City legally can require, due to constitutional 'takings' limitations. If an applicant asserts that the City legally cannot require compliance with the requirements of this section, the City can require compliance only to the extent that the City can demonstrate that the level of easements and improvements required is 'roughly

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[2] LCZO 4.300(2) provides in relevant part:

> "If the applicant intends to assert that it cannot legally be required, as a condition of building permit or site plan approval, to provide easements or improvements at the level otherwise required by this section, the building permit or site plan review application shall include a 'rough proportionality' report, prepared by a qualified civil or traffic engineer, as appropriate, showing:
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> "(a) The estimated extent, on a quantitative basis, to which the improvements will be used by persons served by the building or development, whether the use is for safety or convenience;
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> "(b) The estimated level, on a quantitative basis, of improvements needed to meet the estimated extent of use by persons served by the building or development;
>
> "(c) The estimated impact, on a quantitative basis, of the building or development on the public infrastructure system of which the improvements will be a part; and
>
> "(d) The estimated level, on a quantitative basis, of improvements needed to mitigate the estimated impact on the public infrastructure system."

> proportional' to a combination of the benefits to the building or development from the easements and improvements and the level of easements and improvements needed to mitigate any impacts the building or development will have on the public infrastructure system. The amendment provides that, if an applicant wishes to assert that this section requires easements and improvements that exceed what is 'roughly proportional,' the applicant must provide a report, prepared by a qualified engineer, containing estimated data that will be needed by the City in order to make the required rough proportionality analysis. In other words, the amendment establishes a kind of 'variance' procedure, targeted to this section and the constitutional 'takings' limitations applicable to this section. * * * LUBA has determined [in Reeves v. City of Tualatin, 31 Or LUBA 11 (1996)] that cities have the authority to use this kind of procedure for resolving rough proportionality issues." Record 105-106.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city's amendments to LCZO 4.300 and 4.310(5)(g) are facially unconstitutional because they (1) shift from the city to the applicant the burden of demonstrating that the city's boilerplate exactions are "roughly proportional" to the impacts of the development, and (2) allow a local government to avoid making the "individualized determination" required by the Takings Clause of the Fifth Amendment to the United States Constitution and Dolan v. City of Tigard, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

In Dolan, the Supreme Court of the United States held that the Fifth Amendment Takings Clause requires that exactions a local government imposes as a condition of development approval bear a "rough proportionality" to the impacts of that development. "No precise mathematical calculation is required, but the [local government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 US at 391. In a footnote, the Court commented that, although a party challenging generally applicable zoning regulations has the burden of demonstrating that those regulations are unconstitutional, where a local government makes an adjudicative decision to condition development approval

with respect to an individual parcel, the burden rests on the local government to justify the condition, and hence any dedication required by that condition. 512 US at 391 n 8.

In J.C. Reeves Corp. v. Clackamas County, 131 Or App 615, 887 P2d 360 (1994), the Court of Appeals discussed the local government's burden under Dolan, explaining that "although the [Dolan] Court spoke in terms of a 'burden' resting on the body imposing the conditions rather than on the applicant, the requirements for findings under Oregon's land use decisional scheme may often amount to the practical equivalent of a burden of articulation on local bodies that does not differ materially from what Dolan requires." 131 Or App at 620.

In Art Piculell Group v. Clackamas County, 142 Or App 327, 331, 922 P2d 1227 (1996), the Court of Appeals amplified its above-quoted statement in J.C. Reeves Corp., explaining that:

> "Findings of the traditional kind may serve as the vehicle for the governmental demonstration of rough proportionality but, when so used, they are not subject to the traditional standards for findings at either the local level or on review. Contrary to the usual purely adjudicative role of findings, Dolan effectively places the burden on the factfinder to articulate and substantiate the requisite facts and legal conclusions when, as here, findings are used as the device for the governmental demonstration and determination of rough proportionality." (Emphasis in original).

The court went on to clarify that whether the local government has carried its burden of demonstrating "rough proportionality" is a question of law, albeit one with substantial factual aspects to it. The court then proceeded under that standard of review to evaluate whether the county's findings in that case sufficiently demonstrated that the exactions at issue were roughly proportional to the impacts of the proposed development. The court ultimately remanded the decision so that the county could revise its findings to correct a factual error, and so that the county could reassess its rough proportionality determination in light of those revised findings and in light of the court's discussion of the appropriate legal standard. 142 Or App at 335, 340.

Petitioners argue, based on the above-quoted language from Dolan and Art Piculell Group, that the city's amendments to LCZO 4.300 and 4.310(5)(g) are facially unconstitutional because, when applied, those provisions will result in city actions inconsistent with the city's burden of proof and the individualized determination required by those cases. The city makes a number of responses, discussed below. However, we first consider a threshold issue that neither party addresses: whether and to what extent the Dolan requirements are applicable in evaluating the constitutionality of the city's ordinance under a facial challenge.

Generally, in making a facial challenge to the constitutionality of an ordinance under the Fifth Amendment, the petitioner must demonstrate that the enactment of the challenged ordinance itself constitutes an unlawful taking of property. Cope v. City of Cannon Beach, 317 Or 339, 342-43, 855 P2d 1083 (1993). Under that framework, the petitioner can prevail only if the petitioner can demonstrate either that the ordinance does not substantially advance legitimate state interests or that the ordinance denies the property owner economically viable use of his or her land. Id. at 343. For this reason, some courts have held that the Dolan analysis applies only to as-applied takings challenges, not facial takings cases. See, e.g., Garneau v. City of Seattle, 147 F3d 802, 811 (9th Cir 1998).

In the present case, petitioners do not assert that the challenged ordinance effects an unconstitutional taking, but instead that the ordinance will, as applied in future cases, violate Dolan's burden of proof and individualized determination requirements. However, even when the issue is so framed, it is not clear that Dolan has any applicability other than to provide standards to evaluate particular exactions in as-applied challenges. Nat'l Ass'n of Home Builders v. Chesterfield County (Home Builders), 907 F Supp 166, 168 (1995), aff'd 92 F3d 1180 (4th Cir 1996), cert den 519 US 1056 (1997). In Home Builders, the plaintiffs brought a non-takings facial challenge to a county ordinance authorizing the county to require a "cash proffer," up to a certain maximum amount in approving a zone change

application. The purpose of the proffer was to offset the expense of new development allowed by the rezoning. The District Court questioned, but did not reach, the issue of whether Dolan applied to a non-takings facial challenge under the Fifth Amendment. Instead, the court granted summary judgment to the county on the grounds that, if Dolan applies, the plaintiffs were required, and had failed, to demonstrate that the challenged ordinance is incapable of being applied consistently with the Dolan standard. 907 F Supp at 168. The District Court relied on several federal court cases for the proposition that, in bringing this type of facial challenge to an ordinance, the plaintiffs must establish that no set of circumstances exist under which the ordinance would be valid. Id. (citing United States v. Salerno, 481 US 739, 745, 107 S Ct 2095, 95 L Ed 2d 697 (1987); Action for Children's Television v. FCC, 59 F3d 1249, 1259 (DC Cir 1995); Jordan by Jordan v. Jackson, 15 F3d 333, 343-44 (4th Cir 1994)). Applying that framework, the District Court concluded that there was no reason apparent on the face of the ordinance why any cash proffers required could not be determined in an individualized manner and fixed at an amount roughly proportional to the nature and extent of the impact of the proposed development. 907 F Supp at 168-69.

To the extent Dolan is applicable to facial challenges such as the present case, we agree with the District Court in Home Builders that petitioners must establish from the face of the challenged ordinances that no set of circumstances exist under which those ordinances can be applied consistently with Dolan. With that framework in mind, we turn to the parties' arguments.

We understand petitioners to argue that, however LCZO 4.300 and 4.310(5)(g) are applied in future cases, the city will violate either the burden or individualized determination requirements of Dolan, or both. Petitioners posit two basic scenarios: (1) the applicant declines to submit a rough proportionality report, and the city imposes the boilerplate exactions; and (2) the applicant submits a rough proportionality report. In the first instance,

petitioners argue, the city will have made no "individualized determination" regarding the proportionality of the boilerplate exactions to the impacts of the proposed development. In the second instance, the city will shift the burden of demonstrating rough proportionality from the city to the applicant. Thus, petitioners conclude, the city will, in all applications of LCZO 4.300 and 4.310(5)(g), violate one or both of the Dolan requirements.

The premise for petitioners' argument is the view that Dolan requires the city to assume every burden associated with demonstrating that an exaction is roughly proportional to the impacts of the proposed development. Petitioners argue that in general the term "burden of proof" encompasses both the burden of persuasion and burden of producing evidence. Because the city has the burden of persuasion under Dolan, petitioners argue, it also should have the burden of producing evidence to establish the impacts of the proposed development, and hence what exactions are proportionate to those impacts. Imposing the burden of production on the applicant, petitioners argue, is inconsistent with Dolan because it effectively imposes on the applicant the burden of demonstrating rough proportionality. Petitioners contend that, in essence, the actual and intended effect of the challenged amendments is to require the applicant to demonstrate that the boilerplate exactions are not roughly proportional, as well as what lesser exactions are roughly proportional.

The city responds, and we agree, that neither Dolan nor Art Piculell Group prohibits a local government from requiring that an applicant bear the initial burden of producing evidence that the local government will use in making the requisite rough proportionality determination. Neither Dolan nor Oregon cases applying Dolan use the term "burden of proof." Dolan speaks of the burden "to justify the required dedication." 512 US at 391 n 8. J.C. Reeves Corp. equates that burden to the "burden of articulation" imposed by Oregon's requirement that land use decisions be supported by findings. 131 Or App at 620. Art Piculell Group characterizes the local government's task as the burden "to articulate and

substantiate the requisite facts and legal conclusions[.]" 142 Or App at 331.[3] Petitioners provide no explanation, other than their view of what the terms "burden of proof" and "burden" encompass, why the Takings Clause or Dolan requires that the local government assume the initial evidentiary burden of producing the data on which the rough proportionality determination is based.

We perceive no basis in Dolan or other authority brought to our attention to impose the burden of producing evidence on the local government. The apparent justification for imposing the burden of demonstrating rough proportionality on local governments in quasi-judicial contexts rests on concerns that, where the government demands individual parcels of land or other property through adjudicative, rather than legislative, decision-making, there is a heightened risk of extortionate behavior by the government through ad hoc application of conditions on individuals. Garneau, 147 F3d at 811 (citing Nollan v. California Coastal Comm'n, 483 US 825, 837, 107 S Ct 3141, 97 L Ed 2d 677 (1987) and Ehrlich v. City of Culver City, 12 Cal4th 854, 50 CalRptr2d 242, 911 P2d 429, cert den 519 US 929 (1996)). That purpose, of preventing ad hoc and potentially extortionate application of exactions, is served by requiring the local government to articulate facts and legal conclusions, that is, to adopt findings, demonstrating that the exactions imposed are roughly proportional to the impacts of the proposed development. That purpose does not require that the local government assume the task of generating the evidence necessary to support the rough

[3]The county's proportionality findings reviewed in Art Piculell Group were apparently based on the traffic counts and other evidence that the applicant submitted to the county. See 142 Or App at 333, 337. Although the Court of Appeals' decision spoke of the county's obligation to "articulate and substantiate" the rough proportionality determination, and the court faulted the county for failing to address the applicant's evidence properly, we do not discern any indication in the court's opinion that the county was obligated to produce the evidence on which its proportionality determination was based. Considered in isolation, the term "substantiate" is perhaps broad enough to refer to a burden of production, but in the context in which the court used that term, we hesitate to ascribe to it a meaning so broad. It appears more consistent with the above-quoted language from J.C. Reeves Corp. and Art Piculell Group to understand the local government's burden to "articulate and substantiate the requisite facts and legal conclusions" as meaning that the local government must ensure that its conclusions regarding rough proportionality are supported by evidence in the record, not that the local government must itself produce that evidence.

proportionality determination. Stated differently, neither Dolan nor the Takings Clause is concerned with whether the applicant or the local government must produce the evidence necessary to support the rough proportionality demonstration.

Nonetheless, we understand petitioners to argue that the ordinance provisions challenged in this appeal will do more than require an applicant to produce the traffic counts and other quantifications that may be necessary for a rough proportionality determination. According to petitioners, LCZO 4.300(2) requires that the applicant submit, via the conclusions in the rough proportionality report, the actual rough proportionality determination itself. In other words, petitioners contend, LCZO 4.300(2) shifts not only the burden of producing evidence to the applicant, it also impermissibly shifts to the applicant the burden of demonstrating rough proportionality.

We do not believe that Dolan addresses the question of whether a local government can require that an applicant for land use approval submit not only evidence concerning the development's expected use of and impacts on public infrastructure, but also a report or estimate relating those uses and impacts to proposed exactions. Be that as it may, for purposes of the present facial constitutional challenge we need not and do not decide whether a local government would violate Dolan by adopting an applicant-prepared report regarding rough proportionality. As we discuss further below, even if Dolan does require the local government to originate the analysis and findings necessary to demonstrate rough proportionality, nothing in the challenged amendments requires that the city adopt, or even use in whole or part, the evidence and conclusions in the rough proportionality report submitted under LCZO 4.300(2).

In Art Piculell Group, the court addressed the character of the analysis required to demonstrate rough proportionality. The court first rejected the applicant’s argument that it was impermissible for the county to consider the extent to which the proposed exactions served the needs of the development itself:

> "It is probably impossible to formulate a universal rule concerning how 'benefits' [to the development] are to be factored into the rough proportionality calculus. Nonetheless, it is clear that, insofar as the facts of particular cases may indicate, conditions that in whole or in part serve the needs of the development itself should be weighed differently than pure 'exactions' of the kind that serve only to mitigate an impact of the development on the public or public facilities. It also seems clear that the mix of 'beneficial' and other conditions, as well as the mix of 'beneficial' and other effects that may be attributable to a particular condition, can vary enormously from case to case." 142 Or App at 337.

In a footnote, the Court of Appeals reaffirmed its suggestion in Clark v. City of Albany, 137 Or App 293, 299, 904 P2d 185 (1995), rev den 322 Or 644 (1996), that a demonstration that the proposed development is the sole or principal beneficiary of a proposed exaction or improvement may suffice to demonstrate rough proportionality for that exaction. 137 Or App at 337 n 3.

Thus, in those cases where analysis of the extent to which the proposed exaction benefits the development fails to demonstrate rough proportionality, the local government may go on to consider the extent to which the proposed exaction mitigates the impacts of the proposed development on the public infrastructure. In Art Piculell Group, the court rejected arguments that only certain types of impacts should be factored into the rough proportionality calculus:

> "We agree with LUBA that Dolan does not have the effect of uniformly limiting road improvement conditions to an extent that correlates exactly with the traffic the development will generate, that there can be other kinds of developmental impacts that residential developments can have on street systems, and that all of the impacts appropriately enter into the analysis. See J.C. Reeves Corp., 131 Or App at 622." 142 Or App at 338 (emphasis in original; footnote omitted).

Further, the court suggested that the local government may properly evaluate whether, considered together, the results of its "benefits" and "impacts" analyses demonstrate rough proportionality. Art Piculell Group, 142 Or App at 337 n 3 and 4.

Thus, depending on the facts of the case, a local government's demonstration of rough proportionality may require up to three distinct sets of calculations: (1) evaluation of

the extent to which the proposed exaction will benefit the development; (2) evaluation of the extent to which the proposed exaction will mitigate the development's impacts on the public infrastructure; and (3) evaluation of whether the benefits and impacts analyzed in (1) and (2), considered together, demonstrate that the proposed exaction is roughly proportional to the impacts of the development.

With the foregoing in mind, we return to petitioners' argument that LCZO 4.300(2) requires, on its face, that the applicant assume the burden of articulating the facts and legal conclusions necessary to demonstrate rough proportionality. As noted above, LCZO 4.300(2) is silent as to what, exactly, the city will do with the rough proportionality report once it is submitted. Nothing in LCZO 4.300(2) requires that the city adopt the factual findings or the conclusions in the rough proportionality report. Because LCZO 4.300(2) does not require that the report evaluate whether the benefits and impacts, considered together, demonstrate rough proportionality with any set of proposed exactions, the city might wholly adopt the report's facts and conclusions, but nonetheless justify a higher level of exaction based on further cumulative analysis of the benefits and impacts. As an alternative, the city might adopt the evidence discussed in the report, but disagree with its conclusions, and attempt to demonstrate a higher level of exaction based on facts in the report considered alone or in combination with other evidence in the record. Or, the city might reject the entire rough proportionality report, and attempt to demonstrate that a higher level of exaction is roughly proportional based on evidence and analysis that does not originate in the report. Numerous other permutations of these basic scenarios are conceivable.

In short, we cannot say that petitioners have demonstrated that the challenged amendments will shift to the applicant the burden of demonstrating rough proportionality in all circumstances. Even assuming that Dolan speaks to whether the local government must originate the analysis and findings used to demonstrate rough proportionality, it appears that

at least some circumstances exist in which the city can apply LCZO 4.300(2) consistently with Dolan. Accordingly, we have no basis to declare that provision facially unconstitutional. Home Builders, 907 F Supp at 168.

For the same reason, petitioners' arguments regarding the lack of individualized findings where the city imposes the boilerplate exactions do not provide a basis to invalidate the challenged amendments. Petitioners are certainly correct that, if the city does impose exactions, boilerplate or not, without making the requisite rough proportionality demonstration, that exaction cannot be sustained under Dolan. However, nothing on the face of LCZO 4.300 requires the city to impose the boilerplate exactions without adopting findings demonstrating that those exactions are roughly proportional to the impacts of the proposed development. That being the case, petitioners have not established that no set of circumstances exists in which the city can apply LCZO 4.300 consistently with Dolan. Because the city can apply LCZO 4.300(1), (2), and 4.310(5)(g) consistently with Dolan and its requirements, we conclude that those provisions are not unconstitutional on their face.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the city erred in relying on Reeves v. City of Tualatin, 31 Or LUBA 11 (1996), to justify the challenged amendments, because Reeves was wrongly decided and thus must be overruled.

In Reeves, the Board held that, prior to seeking LUBA's review of a local government's exactions under Dolan, an applicant must exhaust all available local remedies, including seeking a variance from exactions required under the local government's land use regulations. The Board analyzed the issue as a matter of whether a takings claim presented under those circumstances was "ripe" for adjudication, relying upon the Board's similar

holding in Dolan v. City of Tigard, 20 Or LUBA 411 (1991) (Dolan I).[4] Reeves discusses the two primary purposes of the ripeness doctrine, and finds that those purposes are applicable to a challenge to an exaction on the grounds that it is not roughly proportional to the impacts of the development. 31 Or LUBA at 20-21. That is, until the applicant seeks a variance from a proposed exaction, a reviewing body cannot determine if the local government's exaction "goes too far." 31 Or LUBA at 18 (citing Williamson Planning Comm'n v. Hamilton Bank, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985)). Further, administrative relief may lead to mutually acceptable solutions that would obviate the need for adjudication of constitutional questions. 31 Or LUBA at 18 (citing Hodel v. Virginia Surface Mining & Recl. Assoc., 452 US 264, 297, 101 S Ct 2352, 69 L Ed 2d 1 (1981)). In addition, we identified in a footnote several policy considerations that militate for requiring an applicant to exhaust administrative remedies, including seeking a variance, before challenging exactions before LUBA.[5]

In the present case, petitioners argue that the purposes of the ripeness and exhaustion doctrines are not served by requiring an applicant to submit a rough proportionality report

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[4]As we noted in Reeves, our decision in Dolan I was not appealed. The petitioners in Dolan I later applied for and were denied a variance required by our decision. The denial of the variance was appealed and gave rise to Dolan, 512 US 374.

[5]The Board stated in Reeves:

> "First, in allowing a party to bypass the variance process and seek immediate LUBA review, the state policy of decision making at the local level is harmed, in that local decision makers are unable to render a final decision as to how their code will be applied. Second, the policy of judicial economy is served by requiring local resolution of issues rather than burdening the courts with additional cases which properly should be decided elsewhere. Finally, allowing parties to bypass the variance process can only encourage parties to submit applications which, while technically 'complete,' do not address all the relevant issues. In essence, a remand by this Board on the merits in the present case would serve the same purpose as a variance would. That is, if we were to reach the merits of the case and find the conditions unconstitutional, remand would instruct the respondent to alter the literal application of the ordinance to reflect the undue burden it places on the applicant. Our remand then would be the functional equivalent of a variance. Where local decision makers initially have the authority to alter the literal application of an ordinance, they, and not this Board, should decide whether to exercise that authority." 31 Or LUBA at 17 n 5.

before challenging a proposed exaction before LUBA. Essentially, petitioners urge us to distinguish or overrule Reeves and to declare that, in hypothetical future cases challenging the city's imposition of boilerplate exactions under LCZO 4.300(1), LUBA will deny any motion to dismiss that is based on the theory that the petitioner has failed to exhaust administrative remedies by refusing to submit a rough proportionality report.

As framed, petitioners' argument under this assignment of error asks this Board to render an advisory opinion regarding the outcome of LUBA's review in specific as-applied challenges. We decline to do so. While it is not at all clear to us that LCZO 4.300(2) constitutes a "remed[y] available by right" within the meaning of ORS 197.825(2), or that our reasoning in Reeves would apply to a challenge to the city's imposition of boilerplate exactions under LCZO 4.300(1), we need not and do not reach that issue, because nothing in the posture of the facial constitutional challenge before us presents it.

For the foregoing reasons, we decline petitioners' invitation to distinguish or overrule Reeves, and conclude that petitioners' arguments under this assignment of error do not demonstrate a basis to reverse or remand the challenged amendments.

The second assignment of error is denied.

The city's decision is affirmed.