

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

3  
4                                   ROBERT McCLURE and SHARON McCLURE,  
5   *Petitioners,*

6  
7   vs.

8  
9                                   CITY OF SPRINGFIELD,  
10   *Respondent.*

11  
12   LUBA No. 99-121

13  
14   FINAL OPINION  
15   AND ORDER

16  
17                                   Appeal from City of Springfield.

18  
19                                   David B. Smith, Tigard, filed the petition for review and argued on behalf of  
20 petitioners.

21  
22                                   Meg E. Kieran, Springfield, and Joseph J. Leahy, Springfield, filed the response brief.  
23 With them on the brief was Harold, Leahy, Trudeau and Kieran. Meg E. Kieran argued on  
24 behalf of respondent.

25  
26                                   BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
27 participated in the decision.

28  
29   REMANDED

   03/10/2000

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31                                   You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.  
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**NATURE OF THE DECISION**

Petitioners challenge certain conditions that the city imposed in its limited land use decision approving a partition.

**FACTS**

The subject property is a 25,700-square foot parcel located in the city’s Low Density Residential (LDR) zone. A single-family dwelling is sited on the eastern portion of the property. The subject property is bordered on the east by 8th Street, a local street with a 45-foot right-of-way. It is bordered on the south by a 10-foot right-of-way for M Street. M Street is improved with an asphalt bicycle/pedestrian path. The area surrounding the subject property is fully developed with dwellings.

Petitioners, the applicants below, propose to partition the subject property into three parcels. Parcel 1 fronts 8th Street, includes approximately 10,300 square feet, and contains the existing dwelling. Parcel 2 is a 7,700 square-foot parcel, with access to 8th Street via a 20-foot panhandle north of Parcel 1. Parcel 3 is a 7,700 square-foot parcel, with access to 8th Street via a 20-foot panhandle south of Parcel 1. The property could not be further divided under existing zoning.

The city’s planning director approved the proposed partition with conditions.<sup>1</sup> One condition requires that petitioners dedicate 20 feet of right-of-way on the south portion of the subject property to allow for the future development of M Street for both vehicular and bicycle travel. Another condition requires that petitioners dedicate a 10-foot by 10-foot area at the southeast corner of the subject property to ensure adequate sight visibility and turning radius for the M Street/8th Street intersection. The third condition requires that petitioners dedicate a 5-foot strip along the 8th Street frontage of the subject parcel to widen the 8th

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<sup>1</sup>The city adopted more than four conditions of approval. We only describe those conditions challenged by petitioners.

1 Street right-of-way to allow for the construction of a curbside sidewalk and street lighting.  
2 Finally, petitioners are required to improve the 8th Street frontage with sidewalks and street  
3 lighting.

4 Petitioners challenged the conditions of approval to the city planning commission,  
5 arguing that the proposed conditions were excessive, unconstitutional exactions. The  
6 planning commission affirmed the planning director's decision imposing the dedication and  
7 improvement requirements. However, the planning commission modified the fourth  
8 condition of approval to require that petitioners sign a development agreement to ensure  
9 future sidewalk and street lighting improvements, rather than requiring the immediate  
10 construction of the sidewalks and street lighting. The planning commission adopted  
11 supplemental findings to support its decision.

12 This appeal followed.

13 **ASSIGNMENT OF ERROR**

14 Petitioners contend that the challenged conditions of approval are unconstitutional  
15 and prohibited as a matter of law. According to petitioners, the city's findings fail to  
16 demonstrate how the impact of the partition is such that dedication of almost one-fifth of the  
17 subject parcel to public use is justified.

18 **A. Exactions Required as Part of a Partition**

19 Petitioners argue that the Oregon Court of Appeals' holding in *Schultz v. City of*  
20 *Grants Pass*, 131 Or App 220, 884 P2d 569 (1994) makes it clear that the city may not  
21 impose exactions based on future development impacts when it approves a partition, if the  
22 future development is not approved by the partition. According to petitioners, it is not the  
23 land division itself that causes the impacts the city seeks to ameliorate through the imposition  
24 of conditions, but rather the impacts resulting from the development of dwellings, if any, on  
25 the new parcels. Petitioners explain that the city's development code does not regulate the  
26 siting of dwellings once the partition is approved. Petitioners argue that the city's imposition

1 of exactions at this step of the development process is because the city “knows of no  
2 constitutional way to demand the dedications when development occurs that will have  
3 quantifiable impacts.” Petition for Review 12.

4 In *Schultz*, the city approved a partition of 3.85 acres of land into two parcels. As part  
5 of the partition approval, the city required that the applicant dedicate a 20-foot wide strip  
6 along one side of the property and a 10-foot strip along another side of the property, plus  
7 “enough area to round the intersection.” 131 Or App at 222. The city justified the exaction by  
8 arguing that the impact of development upon potential full build-out of the property should  
9 be considered when determining what exactions are “roughly proportional” as required by  
10 *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). Under that  
11 city’s zoning code, the acreage could be further divided to allow up to 20 residential lots on  
12 the property. The Court of Appeals determined that the city’s consideration of full build-out  
13 in *Schultz* was speculative, and that the city should only have considered the impact as  
14 proposed in the application before it—the creation of two parcels. The court reasoned that  
15 the city

16 “imagined a worst-case scenario—assuming that petitioners would, at some  
17 undefined point in the future, attempt to develop their land to its full  
18 development potential of as many as 20 subdivided residential lots, further  
19 assuming that petitioners would obtain all the necessary permits and  
20 approvals—and on the basis of that scenario, it calculated the impacts of the  
21 development and tailored conditions to address them.” *Schultz*, 131 Or App at  
22 228.

23 The city responds that *Schultz* is distinguishable. In *Schultz*, the city erred in basing  
24 the dedication requirements on the impact the property would have on full build-out, rather  
25 than on the impact a two-parcel partition would have on the transportation system. Here, the  
26 city contends that its supposition that the proposed partition would result in the siting of two  
27 new dwellings is a reasonable expectation, because the partition approval apparently is the  
28 last land use decision needed to approve the siting of dwellings on the property. Once the

1 final partition plat is approved, the city argues, there is nothing to prevent the applicants from  
2 immediately obtaining building permits to construct two dwellings.

3 We read *Schultz* to stand for the principle that only those impacts that reasonably  
4 flow from the approval granted may be considered when imposing exactions to ameliorate  
5 the impacts of that approval. In this case, the partition approval is apparently the last city  
6 land use decision necessary to establish dwellings on the resulting parcels. Therefore, the city  
7 could impose exactions that are roughly proportional to the impacts of two dwellings that  
8 may be sited on the two new lots by virtue of the challenged partition decision.

9 This subassignment of error is denied.

#### 10 **B. Rough Proportionality**

11 Petitioners’ remaining subassignments of error require some discussion of the  
12 analysis in *Dolan*, and the Oregon cases that have interpreted it, to determine whether, in this  
13 case, the city has demonstrated that the exactions are constitutionally permissible. In *Dolan*,  
14 the owner of a hardware store sought to expand its facility and paved parking on a two-acre  
15 site located next to a creek. The city approved the proposal, provided the owner dedicate  
16 approximately 15 percent of the site to the public to allow for protection of a floodplain and  
17 the development of a creekside bikeway. The U.S. Supreme Court determined the city failed  
18 to demonstrate that the exactions were “roughly proportional” to the impact the hardware  
19 store expansion would have on public facilities. The Court explained that in order for the city  
20 to require the dedications it sought, the city had to make “some sort of individualized  
21 determination that the required dedication is related both in nature and extent to the impact of  
22 the proposed development.” *Dolan*, 512 US at 391. The Court stated that “no precise  
23 mathematical calculation is required, but the city must make some effort to quantify its  
24 findings in support of the dedication \* \* \*.” *Id.* at 395-96.

25 In the cases since *Dolan*, Oregon courts have examined the types of particularized  
26 findings needed to support an exaction. In *Clark v. City of Albany*, 137 Or App 293, 904 P2d

1 185 (1995), the Court of Appeals determined that the city’s requirement that a property  
2 owner improve street frontage and an intersection before he could expand his fast-food  
3 franchise was impermissible. The court decided that the city failed to demonstrate with  
4 particularity that the increase in traffic generated by the expanded business was roughly  
5 proportional to the required improvements.

6 In *Art Piculell Group v. Clackamas County*, 142 Or App 327, 922 P2d 1227 (1996),  
7 the Court of Appeals considered a county’s requirements for a dedication of land and the  
8 improvements to streets fronting a proposed subdivision. In that case, the frontage road, once  
9 constructed, would serve regional transportation needs by connecting a majority of the  
10 vehicular traffic generated by existing nearby developments with major arterial streets. The  
11 court explained that, in making the determination that the exactions are roughly proportional  
12 to the impacts of development, the decision maker has the burden to

13 “articulate and substantiate the requisite facts and legal conclusion when, as  
14 here, findings are used as the device for the governmental demonstration and  
15 determination of rough proportionality.” *Art Piculell Group*, 142 Or App at  
16 331.

17 The court also stated that *Dolan* requires “considerable particularity in local government  
18 findings that are aimed at showing the relationship between a developmental condition and  
19 the impacts of development.” *Id.*, quoting *J.C. Reeves Corp. v. Clackamas County*, 131 Or  
20 App 615, 618, 887 P2d 360 (1994).

21 In circumstances where the proposed development derives a benefit from the required  
22 dedications and improvements, the court said

23 “[C]ertain approval conditions, although they involve dedications or are  
24 otherwise of a kind to which *Dolan* applies, can have the principal or  
25 overlapping effect of serving the needs of the development itself rather than,  
26 or as well as, offsetting impacts that the development will cause  
27 elsewhere. \* \* \*

28 “It is probably impossible to formulate a universal rule concerning how  
29 ‘benefits’ of that kind are to be factored into the rough proportionality  
30 calculus. Nonetheless, it is clear that, insofar as the facts of particular cases

1 may indicate, conditions that in whole or in part serve the needs of the  
2 development itself should be weighed differently than pure ‘exactions’ of the  
3 kind that serve only to mitigate an impact of the development on the public or  
4 public facilities. It also seems clear that the mix of ‘beneficial’ and other  
5 conditions, as well as the mix of ‘beneficial’ and other effects that may be  
6 attributable to a particular condition, can vary enormously from case to case.  
7 Given that, the absolute rule \* \* \* that beneficial effects may only be  
8 considered if they are the *only* effects present, is not logically  
9 supportable. \* \* \* [W]e conclude that the \* \* \* consideration of ‘benefits’  
10 [conferred upon the development as a result of the exaction is] not erroneous  
11 as an analytical approach. We emphasize, however, that that approach can be  
12 an appropriate *consideration* in *applying* the *Dolan* test, where the facts for it  
13 are present, but it should not be misunderstood as *being* the test.” *Art Piculell*  
14 *Group*, 142 Or App at 336-37 (emphasis in original).

15 Under the analysis the court provided in *Art Piculell Group*, it is appropriate to  
16 include some consideration of benefits to the parcels created by the partition, as well as  
17 impacts from the new parcels, in the rough proportionality analysis required by *Dolan*.

#### 18 **1. Findings Supporting Exactions**

19 We now turn to the findings the city adopted to justify its exactions.

20 The city’s findings identify eight bases to support its requirements for street  
21 dedications and sidewalk improvements:

- 22 1. The code requires the dedication of needed right-of-way “whenever an  
23 existing street of inadequate width is abutting or within a development  
24 area requiring Development Approval.” Springfield Development  
25 Code (SDC) 32.020(10)(a). Record 67.
- 26 2. The proposed development will significantly increase vehicular,  
27 bicycle and pedestrian traffic. Record 68.
- 28 3. The property will benefit from the M Street improvements, sidewalks  
29 and the 10-foot by 10-foot clipped corner. A duplex may be sited on  
30 property located on a corner of two city streets. Thus, the property  
31 owner of Parcel 1 will benefit from the required street dedications by  
32 being able to place a duplex on that parcel. The owner of Parcel 3 will  
33 benefit from having a street fronting the parcel, rather than having to  
34 maintain the flag driveway to the main portion of the parcel. The  
35 owner of Parcel 3 will also have better access for emergency vehicles,  
36 and immediate access to a public street. Record 68.

- 1           4.       The increased traffic caused by the panhandle driveway for Parcel 3  
2                   presents a safety hazard. Record 69.
- 3           5.       The conditions of approval will have no significant impact on the  
4                   owners' use of the property. Record 69.
- 5           6.       The proposed development is located in an "infill" area and is the last  
6                   development of the property. Record 70.
- 7           7.       The appellants purchased the property subject to and with knowledge  
8                   of the public dedications and the improvements the city would require  
9                   prior to development of the property. Record 71.
- 10          8.       The area of the city where the subject property is located "lacks  
11                   sufficient east-west connectivity." Acquiring the needed right-of-way  
12                   for M Street will allow for the eventual vehicular connection between  
13                   the segment of M Street that currently terminates on the west side of  
14                   7th Street, and the segment of M Street that currently terminates on the  
15                   east side of 8th Street. In doing so, the residents of the area will have  
16                   better connections to local schools and emergency services. Record  
17                   80-81.

18           In reviewing the findings, we first determine which identified impacts or benefits are  
19           not relevant for purposes of the *Dolan* test. We then look at whether the remaining findings  
20           adequately quantify the benefits to the development or the impacts of the development on  
21           public facilities, and whether those findings suffice to demonstrate that the city's exactions  
22           are "roughly proportional" to those benefits or impacts.

23           **2.       Improper Considerations under *Dolan***

24                   **a.       Legislative vs. Quasi-judicial Dedication Requirements**

25           Petitioners contend that having the dedication requirements codified in the city's  
26           ordinance does not relieve the city of the obligation to make particularized findings  
27           determining that *this* development generates enough vehicular, bicycle and pedestrian traffic  
28           to justify the exactions imposed. The city agrees with petitioners that *Dolan* imposes an  
29           obligation on the city to adopt findings to show that exactions required under the city's  
30           ordinances are roughly proportional to the impact of the proposed partition. However, the  
31           city also argues that it has done so here. We agree with both parties that the fact that an



1    exaction is required by city ordinance is irrelevant to whether an exaction imposed pursuant  
2    to that ordinance is in fact roughly proportional to the impacts of development.

3                   **b.     Use of Property**

4            Petitioners argue that the city impermissibly justified the M Street right-of-way  
5    exaction, in part, on the basis that petitioners’ use of Parcel 3’s panhandle for access is  
6    similar whether the property remains in private ownership or is dedicated as right-of-way.  
7    According to petitioners, the “right to exclude others [is] ‘one of the most essential sticks in  
8    the bundle of rights that are commonly characterized as property.’” *Dolan*, 512 US at 393,  
9    citing *Kaiser Aetna v. United States*, 444 US 164, 176, 100 S Ct 383, 62 L Ed 2d 303 (1979).  
10   Petitioners argue that it is the loss of this right that requires that the city make the  
11   individualized findings required by *Dolan* and any similarity between the proposed public  
12   and private uses is irrelevant.

13           We agree with petitioners that the fact that the disputed area will be used for  
14   transportation access whether it is a privately owned panhandle or a publicly owned right-of-  
15   way is not relevant under *Dolan* because that consideration is neither a benefit to the  
16   property nor an impact of the development on the public infrastructure. Therefore, the  
17   finding justifying the right-of-way exaction in part because of perceived similarities in use  
18   between the public right-of-way and a privately owned driveway is not a proper  
19   consideration under *Dolan*.

20                   **c.     “Infill” Development**

21           According to the city, the property is one of the last parcels in the area to be fully  
22   developed. There may be some circumstances where the fact that the proposed development  
23   is infill may pose an identifiable impact on the city’s infrastructure beyond that of non-infill  
24   development.<sup>2</sup> However, in this case, the city has not established that the fact that this

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<sup>2</sup>*But see, Art Piculell Group*, 142 Or App 339-40 (“[t]he concern under *Dolan* is not with the [fair share] apportionment of costs for a general improvement over the general body of benefitted property owners, but

1 particular development is infill has any impacts that would justify any of the exactions  
2 imposed.

3 **d. Knowledge of the Exactions the City Would Impose**

4 Petitioners argue that the city erred in justifying the exactions, in part, on the basis  
5 that the subject property was subject to a prior approval for a partition plat. The first approval  
6 subjected the applicants to exactions similar to those imposed as a result of the city's  
7 decision in this case. Petitioners purchased the property while that approval was in force;  
8 however, petitioners let the time period for fulfilling all conditions pass, and no final  
9 partition plat was ever filed within that time period.

10 The city argues that petitioners purchased the subject property with knowledge of the  
11 prior conditions of approval and, therefore, they cannot object to the imposition of those  
12 same conditions in the instant case.

13 The difficulty we have with the city's argument is that the city has not demonstrated  
14 that petitioners are bound in any way to the first partition plat approval or are otherwise  
15 estopped from contesting the conditions of approval. The city concedes that the first approval  
16 has lapsed, and that petitioners have filed a completely new partition application in order to  
17 divide the property. The fact that petitioners may have been aware of the conditions of  
18 approval in the first case does not provide a basis for concluding that petitioners agreed to  
19 the imposition of the exactions, or that the exactions imposed here are roughly proportional  
20 to the impact of the proposed development.

21 **e. City Transportation Needs**

22 The city justified its decision in part because the area in which the proposed partition  
23 is located "lacks sufficient east-west connectivity." Record 80. The city found that the

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with the extent to which particular property may be burdened because of impacts that are attributable to its development") and *Dept. of Transportation v. Altimus*, 137 Or App 606, 611, 905 P2d 258 (1995) (in determining the amount of land that may be exacted as a condition of approval, the local government must look at the impact of the proposed development, and not the amount of land the local government needs to accomplish its transportation goals.)

1 residents of the area would benefit from the M Street dedication by improved access to  
2 schools and emergency services, in addition to better access to other areas of the community.

3 As we discuss below, the benefits that the proposed development derives from a  
4 proposed exaction may be included in the rough proportionality analysis, as well as the  
5 impact the development may have on the city's infrastructure. However, we agree with  
6 petitioners that benefits to the larger community are not appropriate considerations under  
7 *Dolan*. To the extent the city justifies exactions based on benefits to the community as  
8 opposed to specific benefits to the subject property, the city erred.<sup>3</sup>

9 **3. *Dolan* Considerations**

10 **a. Impacts on Transportation Facilities**

11 Petitioners argue that, even if the additional traffic attributable to two dwellings is  
12 considered, the city has not quantified the total amount of traffic likely to use the adjacent  
13 segments of M Street and 8th Street. Absent such quantification, petitioners contend the  
14 city's determination that two dwellings will generate 19 vehicular trips per day is  
15 meaningless. In addition, petitioners contend that the city's findings do not establish that the  
16 dedications are roughly proportional to the impact on those segments caused by vehicular  
17 traffic originating from petitioners' development. Petitioners further argue that the findings  
18 quantify the impact of two dwellings on vehicular traffic, but do not quantify the number of  
19 bicycle and pedestrian trips likely to be generated by the proposed development.<sup>4</sup>

20 The city responds that when it determined the necessary amount of land to be  
21 dedicated, it was conservative in using only the traffic likely to be generated by two

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<sup>3</sup>It may be that improved east-west connectivity provides some specific benefits to the property owners in the proposed partition based on better access for emergency vehicles; however, as we discuss below, the decision does not quantify those benefits in any meaningful manner.

<sup>4</sup>The city's findings with regard to additional bicycle and pedestrian trips indicate that the increase in such trips generated by the proposed development will be proportional to vehicle trips generated. Record 68. The findings do not quantify existing bicycle and pedestrian trips on either the M Street bicycle path or on 8th Street.

1 additional single-family dwellings. According to the city, the residential zone allows  
2 numerous intensive uses outright, and any of those uses would generate considerably more  
3 than the 19 vehicular trips estimated to be generated by the single-family dwellings.<sup>5</sup> The  
4 city contends that the additional parcels with the resulting potential for more intensive uses  
5 justify the dedication.

6         The difficulty we have with the city’s response is that nowhere in the decision itself  
7 does the city rely upon potential traffic generated by other uses allowed in the zone to  
8 support its finding that the dedications are justified. That problem aside, the city’s findings  
9 are not adequate to demonstrate that impacts on transportation facilities justify the exactions.  
10 It may be that in some cases the number of vehicular trips a proposed development is  
11 expected to generate may be so large and the exactions that are imposed so small that it will  
12 be readily apparent, without additional explanation, that the exactions are roughly  
13 proportional to the expected traffic impact. However, in this case, it is not self-evident that  
14 the additional vehicular traffic that is expected from the two additional lots warrants the  
15 required 20-foot right-of-way dedication for future improvement of M Street.

16         In most cases, it will not be sufficient to “simply posit the relationship between  
17 subdivision-generated traffic and the need for the improvements.” *J.C. Reeves Corp.*, 131 Or  
18 App at 622. In such cases, some additional findings to quantify the relationship between the  
19 expected additional traffic and the impact of that traffic on the affected transportation system  
20 will be required. The nebulous nature of the *Dolan* rough proportionality test means the  
21 findings could approach this additional quantification effort in a variety of different ways in  
22 different contexts. However, *Dolan* will often require such additional quantification. The

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<sup>5</sup>SDC 16.020 provides that, in low density residential zones, allowed uses include: day care homes for up to 12 children; adult day care facilities for up to 12 adults; residential facilities housing up to 15 persons and “low impact” public utility facilities.

1 required quantification is missing here, with regard to the city’s reliance on the expected  
2 additional vehicular traffic as a basis for imposing the disputed exaction.

3 The findings regarding additional bicycle and pedestrian trips are even more basically  
4 flawed in that they fail to adequately identify and quantify the number of trips generated by  
5 the dwellings. In addition, they make no attempt to establish a relationship between the  
6 number of nonvehicular trips from the proposed development, whatever that number may be,  
7 and its effect on the transportation system. In summary, the city has not adequately explained  
8 why the increased vehicular, pedestrian, and bicycle traffic that may be expected from the  
9 additional lots approved by the disputed partition constitute impacts that are roughly  
10 proportional to the required dedications and improvements along M Street and 8th Street.

11 **b. Benefits Accruing to the Subject Property**

12 Petitioners concede that there may be some benefits that accrue to the property owner  
13 as a result of improvements to the streets and sidewalks. However, they argue that in this  
14 case the city cannot rely on any supposed benefits attributable to the right-of-way dedications  
15 and sidewalk improvements because those benefits have not been quantified.

16 The city responds that it is not necessary to put a numerical or dollar value on the  
17 benefits that the property owner receives as a result of the exactions. The city argues that in  
18 some cases, it is impossible to do so.<sup>6</sup> The city contends that it identified specific benefits  
19 that the owners of the resulting parcels will enjoy as a result of the approval of the partition  
20 and the exactions, and that identification of the benefits is sufficient to justify the exactions.

21 The city’s findings state:

22 “The property will benefit in the following manner:

- 23 “• Parcel 3 will have improved access and full frontage onto a City street.

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<sup>6</sup> At oral argument, the city used as an example the impossibility of measuring the benefit to the owners resulting from the installation of sidewalks and lighting on city streets. According to the city, it is impossible to place a dollar value on lives saved as a result of providing safe pedestrian access, and that it is equally impossible to allocate that value between the owners of the partitioned property and the community overall.

- 1           “•     All three parcels will have safer and better transportation connectivity.
- 2           “•     The transportation safety of the future residents of all three parcels
- 3           will be improved.
- 4           “•     Fire and Life Safety vehicles will be able to reach the property
- 5           faster.<sup>[7]</sup>
- 6           “•     Public services such as storm drainage, water and electricity can be
- 7           provided in a more efficient manner.
- 8           “•     Parcel 1 will have enhanced value because it may be developed with a
- 9           duplex.” Record 68.

10           We agree with petitioners that, in this case, the city’s findings are insufficient to  
11 quantify those benefits and relate them to the amount of land required to be dedicated or  
12 improved. We tend to agree with the city that some of these benefits may be difficult to  
13 quantify. However, unless the city makes some effort to quantify these potential benefits,  
14 they will be of limited assistance to the city in applying the rough proportionality analysis  
15 required by *Dolan*.

16                           **c.     Safety Concerns**

17           Table 32-4 of the SDC requires that in the residential zone “minimum separations  
18 between a standard driveway and the nearest [local street] intersection curb return on the  
19 same side of the street” must be 30 feet. SDC 32.080(4)(a) provides that “intersections  
20 involving curb-return driveways and streets, whether public or private, shall be directly  
21 opposed \* \* \*.” The city determined that these particular standards were applicable to the  
22 subject application and found that the standard could be satisfied by imposing the 20-foot  
23 dedication requirement for M Street. The city’s rationale for doing so was that the standards  
24 would be satisfied by eliminating the driveway at the time M Street is improved for vehicular

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<sup>7</sup>The city’s findings indicate that if M Street is fully improved, better access for fire and other emergency vehicles would be available to the parcels approved as a result of the challenged decision.

1 access. The city cited general policies that discouraged the establishment of panhandle lots as  
2 further support for its exaction.

3           Petitioners argue that the conditions of approval requiring the dedication of 20 feet of  
4 right-of-way on M Street are not justified by the city’s stated safety concerns regarding the  
5 interface between bicyclists using the M Street bike path and the creation of a driveway in  
6 the panhandle of Parcel 3. According to petitioners, there may be some safety issues involved  
7 with bicycles crossing 8th Street on M Street. However, petitioners argue that at the  
8 intersection between the panhandle of Parcel 3 and 8th Street, only southbound turns from  
9 the driveway could pose a conflict between bicyclists and drivers exiting from Parcel 3.  
10 Petitioners contend that *all* trips generated from a driveway from Parcel 3 directly onto the  
11 extension of M Street would interfere with bicycle traffic on that street. Thus, petitioners  
12 argue that the dedication requirement would exacerbate, rather than mitigate, the safety  
13 situation. According to petitioners, the vehicular traffic turning onto the improved connection  
14 to M Street from 8th Street will create a new risk to bicyclists crossing from one segment of  
15 M Street to another.

16           In addition, petitioners argue that the SDC Table 32-4 standards do not even apply,  
17 because the 20-foot wide bikeway does not constitute a “street” with a “curb return” as those  
18 terms are used in the code. To the extent they are applicable, petitioners contend the  
19 driveway with curb cuts onto 8th Street does comply with the standard, because the driveway  
20 is “directly opposed” to the existing intersection of the improved segment of M Street and  
21 8th Street.

22           The city responds that the planning commission determined that the purpose of SDC  
23 Table 32-4 is “to provide ample distance between a public transportation facility and a  
24 private driveway to allow for safe turning movements,” and therefore, the requirement for the  
25 dedication of 20 feet of right-of way was necessary to eliminate the safety hazard caused by  
26 the establishment of a panhandle driveway on Parcel 3. Respondent’s Brief 15.

1 The planning commission's findings state:

2 "As proposed, the panhandle driveway will create safety problems due to the  
3 proximity of the bicycle path and the existing 8th and M Street intersection.  
4 The bicycle path provides bicycle and pedestrian connectivity between the  
5 residential areas east of the appellants' property and Mofitt Elementary and  
6 Hamlin Middle School, both located approximately 4 blocks west of the site.  
7 Establishing the panhandle driveway directly to the north of the bike path will  
8 create a dangerous interface between the path users, existing vehicular traffic  
9 at the intersection and the residents of Parcel 3. Cars pulling out of the  
10 driveway would have to contend with automobiles coming from three  
11 directions and bicycles and pedestrians coming from or proceeding towards  
12 the bicycle path. Vehicles backing out rather than pulling front-ways out of  
13 the panhandle driveway will exacerbate this safety problem. There are no  
14 provisions in the SDC that give the City the regulatory authority to prevent  
15 automobiles from backing out of a driveway. SDC Table 32-4 regulates  
16 situations such as this by requiring a 30-foot separation between single-family  
17 and duplex driveways and the nearest intersection curb return on the same  
18 side of the street. Although the bicycle path is an asphalt mat and does not  
19 have a curb return, the intent of the requirement is to provide ample distance  
20 between a public transportation facility and a private driveway to allow for  
21 safe turning movements. To allow the panhandle driveway to be located less  
22 than 30 feet from the bicycle path is a clear violation of the [SDC] and will  
23 perpetuate a hazardous situation." Record 69.

24 The city found that the policy underlying the SDC Table 32-4 standards justified, at  
25 least in part, the right-of-way exactions. If the extent of the identified safety concern justifies  
26 some or all of the right-of-way dedication requirements, and any other improvements that  
27 may ameliorate the impact, the city may impose those conditions that are roughly  
28 proportional to the impact caused by approval of this partition. However, it is not clear that  
29 SDC Table 32-4 standards apply to the partition application before us. If they or some other  
30 land use standards do apply, they may provide a basis for the city to deny the proposed  
31 partition unless the perceived safety problems associated with the panhandle are corrected.  
32 However, it does not necessarily follow that the exaction imposed by the city is the only  
33 solution to that perceived safety problem or that it is roughly proportional to those safety  
34 impacts.

35 The assignment of error is sustained, in part.



1 **CONCLUSION**

2 Looking at the findings and the evidence the city relied upon to support its findings, it  
3 is clear that they are inadequate to justify the exactions imposed. The findings concerning  
4 impacts and benefits, even when read together, do not satisfy the *Dolan* rough  
5 proportionality requirement. *Art Piculell Group*, 142 Or App at 335 (LUBA must determine  
6 whether, cumulatively, the county’s findings satisfy the rough proportionality test).

7 OAR 661-010-0073 provides, in relevant part:

8 “(1) The Board shall reverse a limited land use decision when:

9 “\* \* \* \* \*

10 “(b) The decision is unconstitutional; \* \* \*

11 “(2) The Board shall remand a land use decision for further proceedings  
12 when:

13 “(a) The findings are insufficient to support the decision, except as  
14 provided in ORS 197.835(11)(b);

15 “(b) The decision is not supported by substantial evidence in the  
16 record. \* \* \*”

17 Petitioners argue that the city’s decision is unconstitutional, and therefore the  
18 decision should be reversed. The city argues that if we sustain any assignments of error, we  
19 should remand the decision for further proceedings consistent with our opinion.

20 The city’s findings fail to quantify the impacts of the proposed development with  
21 sufficient particularity to justify the exactions it imposed. However, this does not mean that  
22 petitioners are entitled to the reversal they seek. As our above discussion indicates, the city  
23 may be able to adopt findings that justify some or all of the exactions imposed. Accordingly,  
24 remand is appropriate. OAR 661-010-0073(2)(a) and (b).

25 The city’s decision is remanded.